Applicant Details

First Name	**Elijah**
Last Name	**Gelman**
Citizenship Status	**U. S. Citizen**
Email Address	**elijah.gelman@law.northwestern.edu**
Address	**Address** Street **244 E. Pearson St., Apt. 912** City **Chicago** State/Territory **Illinois** Zip **60611** Country **United States**
Contact Phone Number	**8473233636**

Applicant Education

BA/BS From	**Northwestern University**
Date of BA/BS	**March 2021**
JD/LLB From	**Northwestern University School of Law** **http://www.law.northwestern.edu/**
Date of JD/LLB	**May 12, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Northwestern University Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Miner Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Rountree, Meredith
meredith.rountree@law.northwestern.edu
(312) 503-0227
Mitchell, Raymond
rmitchell900@sbcglobal.net
(312) 603-5918
Nzelibe, Jide
j-nzelibe@law.northwestern.edu
(312) 503-5295

References

Judge Raymond W. Mitchell, Illinois Appellate Court, First District, rmitchell900@sbcglobal.net; 312-793-5484

Professor Jide Okechuku Nzelibe, Northwestern Pritzker School of Law,
j-nzelibe@law.northwestern.edu; 312-503-5295

Professor Meredith Martin Rountree, Northwestern Pritzker School of Law, meredith.rountree@law.northwestern.edu; 312-503-0227

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ELIJAH GELMAN
244 E. Pearson St., Apt. 912, Chicago, IL 60611 • elijah.gelman@law.northwestern.edu • (847) 323-3636

June 12th, 2023

The Honorable Michael B. Brennan
U.S. Court of Appeals, Seventh Circuit
U.S. Courthouse and Federal Building
517 East Wisconsin Avenue
Milwaukee, WI 53202

Dear Judge Brennan:

Enclosed is an application for a clerkship in your chambers for the 2024–25 term. I am a rising third-year student at Northwestern Pritzker School of Law and will graduate in May 2024. I am currently a summer associate at Jenner & Block exploring various types of law and learning how to best advocate for clients. But my interest in clerking stems from my goal to become a judge. The aspect of law that most interests me is figuring out what the law means, and while an advocate does interpret the law to the advantage of their client, only a judge can focus on finding the best interpretation of the law. I am especially interested in clerking in the Seventh Circuit, as I have lived in Chicago my whole life and plan to spend the rest of my legal career here.

My experience at Northwestern has prepared me to make meaningful contributions to your chambers. Last year I externed for Judge Raymond W. Mitchell in both Illinois Chancery and Appellate court. Reading the briefs and analyzing the ways attorneys construct their arguments has helped me understand what convincing argumentation looks like. Drafting rulings improved my analytical proficiency and made me a clearer and more concise writer. My time on the *Northwestern University Law Review* this year as an executive editor has further prepared me for clerking, as I have honed my attention to detail through editing the citations and grammar of published articles.

My application includes a resume, law transcript, undergraduate transcript, and writing samples. Letters of recommendation are provided from:

Judge Raymond W. Mitchell, Illinois Appellate Court, First District,
rmitchell900@sbcglobal.net; 312-793-5484

Professor Jide Okechuku Nzelibe, Northwestern Pritzker School of Law,
j-nzelibe@law.northwestern.edu; 312-503-5295

Professor Meredith Martin Rountree, Northwestern Pritzker School of Law,
meredith.rountree@law.northwestern.edu; 312-503-0227

I would welcome the opportunity to interview with you to discuss my qualifications and interest in the position. Thank you for your consideration.

Respectfully,

Elijah Gelman

Elijah Gelman

ELIJAH GELMAN
244 E. Pearson St., Apt. 912, Chicago, IL 60611 • elijah.gelman@law.northwestern.edu • (847) 323-3636

EDUCATION

Northwestern Pritzker School of Law, Chicago, IL
Candidate for Juris Doctor, May 2024

- GPA: 3.97; Dean's List (four semesters)
- Merit Scholarship recipient
- Kirkland & Ellis Scholar in Contracts (awarded for highest grade in first year section)
- Executive Editor, Northwestern University Law Review
  Note: *Hung Out to Try: A Rule 29 Revision to Stop Hung Jury Retrials*, NW. U. L. REV. (Forthcoming 2023)
- Teaching Assistant, Contracts, Professor Jide Nzelibe

Northwestern University, Evanston, IL
Bachelor of Arts in History—Americas, summa cum laude, March 2021

- GPA: 3.96; Dean's List (all quarters)
- Esports, Club Leader

EXPERIENCE

Jenner & Block, LLP, Chicago, IL
Summer Associate, May 2023–July 2023

The Honorable Raymond W. Mitchell, Chicago, IL
Judicial Extern, Illinois Appellate Court, First District, July 2022–August 2022

- Drafted appellate opinions, including rulings on arbitration vacatur and summary judgment.

Judicial Extern, Circuit Court of Cook County, Chancery Division, May 2022–July 2022

- Researched and drafted at least one motion ruling per week, including dismissal, summary judgment, and arbitration vacatur motions.
- Analyzed various documents, including briefs, exhibits, and draft rulings.
- Observed court's hearings and assisted judge with issue analysis.

Chicago Appleseed: Center for Fair Courts, Chicago, IL
Intern, September 2020–June 2021

- Conducted an economic analysis to support legislation mandating earlier access to phones for arrestees.
- Authored blog posts summarizing proposals for civilian police oversight and The Judicial Quality Act, which increased bias training requirements for Illinois judges.
- Researched and authored an in-depth historical review of Chicago's past attempts to install a police oversight system.
- Participated in 3–4 weekly brainstorming meetings regarding initiating legislation.
- Drafted proposal for an Illinois court watching program that synthesized other states' court watching systems.
- Created and tested a judge evaluation form to identify judicial bias.

Northwestern University Esports Club, Evanston, IL
Head Tournament Organizer, September 2018–June 2021

- Organized over 20 events per year, most of which included more than 30 participants.
- Oversaw over 60 matches for each event to ensure they started promptly and ended on time.
- Planned four large events in conjunction with other university Esports leaders across Chicago.

INTERESTS

Chess (co-captain of high school team, 2nd at State); baseball; and Nintendo video games

Northwestern
PRITZKER SCHOOL OF LAW

UNOFFICIAL GRADE SHEET

THIS IS NOT AN OFFICIAL TRANSCRIPT

The Northwestern University School of Law permits the use of this grade sheet for unofficial purposes only.
To verify grades and degree, students must request an official transcript produced by the Law School.

Name:	**Elijah Gelman**	Total Earned Credit Hours:	60.000
Matriculation Date:	2021-08-30	Total Transfer Credit Hours:	0.000
Program(s):	Juris Doctor	Cumulative Credit Hours:	60.000
		Cumulative GPA:	3.977

Term	Term GPA	Course	Course Title	Credits	Grade	Professor
2021 Fall	4.071	BUSCOM 510	Contracts	3.000	A	Nzelibe,Jide Okechuku
		CRIM 520	Criminal Law	3.000	A+	Rountree,Meredith Martin
		LAWSTUDY 540	Communication& Legal Reasoning	2.000	A	Holman,Rebekah
		LITARB 530	Civil Procedure	3.000	A	Clopton,Zachary D.
		PPTYTORT 550	Torts	3.000	A	Friedman,Ezra
2022 Spring	3.856	BUSCOM 601S	Business Associations	3.000	A	Litvak,Katherine Valerie
		CONPUB 500	Constitutional Law	3.000	B+	Delaney,Erin F.
		LAWSTUDY 541	Communication& Legal Reasoning	2.000	A	Holman,Rebekah
		PPTYTORT 530	Property	3.000	A	DiCola,Peter Charles
		PPTYTORT 650	Intellectual Property	3.000	A	Pedraza-Farina,Laura Gabriela
2022 Summer	4.000	CONPUB 647	Practicum: Judicial	4.000	A	Brown,Janet Siegel
2022 Fall	3.800	CONPUB 600	Administrative Law	3.000	A	McGinnis,John O
		CONPUB 628	Presidential Power and the Law	3.000	A-	Kitrosser,Heidi D
		CONPUB 644	Legislation	3.000	A-	Kleinfeld,Joshua Seth
		CRIM 610	Constitutional Crim Procedure	3.000	B+	Allen,Ronald J
		LITARB 671	Juries	3.000	A+	Diamond,Shari
2023 Spring	4.203	CONPUB 650	Federal Jurisdiction	3.000	A	Pfander,James E
		CRIM 620	Criminal Process	3.000	A+	Rountree,Meredith Martin
		LAWSTUDY 710	Privacy Law	3.000	A+	Kugler,Matthew B.
		LITARB 600	Legal Ethics	2.000	A+	Muchman,Wendy
		LITARB 608	Litigation,Crises & Strat Comm	2.000	A	Loeb,Harlan A.

Run Date: 6/2/2023 Run Time: 15:41:54 PM

Northwestern University
633 Clark Street
Evanston, IL 60208
United States

Name: **Gelman,Elijah Nathan**
Student ID: **3025913**

Unofficial Transcript

Print Date: 07/13/2020

Test Credits

Test Credits Applied Toward Weinberg College of Arts & Sci

2017 Fall

Course		Description	Attempted	Earned	Grade	Points
ENGLISH	1LC	English Lang & Comp Credit	1.000	1.000	T	0.000
ENGLISH	1LC	English Lang & Comp Credit	1.000	1.000	T	0.000
HISTORY	2EU	European History Credit	1.000	1.000	T	0.000
HISTORY	2EU	European History Credit	1.000	1.000	T	0.000
HISTORY	2US	US History Credit	1.000	1.000	T	0.000
HISTORY	2US	US History Credit	1.000	1.000	T	0.000
MATH	220-0	Differential Calc One-Variable	1.000	1.000	T	0.000
PSYCH	110-0	Introduction to Psychology	1.000	1.000	T	0.000
STAT	202-0	Introduction to Statistics	1.000	1.000	T	0.000

Test Trans GPA: 0.000 Transfer Totals: 9.000 9.000 0.000

Beginning of Undergraduate Record

2017 Fall (09/19/2017- 12/09/2017)

Program: Weinberg College of Arts & Sci
Plan: Undeclared Major

Course		Description	Attempted	Earned	Grade	Points
ECON	201-0	Introduction to Macroeconomics	1.000	1.000	A	4.000
ENGLISH	105-0	Expository Writing	1.000	1.000	A	4.000
HISTORY	326-0	U.S. Intellectual History	1.000	1.000	A-	3.700
PHIL	109-6	First-Year Seminar	1.000	1.000	A	4.000
Course Topic:		Values and Power				

			Attempted	Earned	GPA Units	Points
Term GPA	3.925	Term Totals	4.000	4.000	4.000	15.700
Transfer Term GPA		Transfer Totals	9.000	9.000	0.000	0.000
Combined GPA	3.925	Comb Totals	13.000	13.000	4.000	15.700

2018 Winter (01/08/2018- 03/24/2018)

Program: Weinberg College of Arts & Sci
Plan: Undeclared Major

Course		Description	Attempted	Earned	Grade	Points
ANTHRO	213-0	Human Origins	1.000	1.000	A	4.000
PHIL	210-3	History of Philosophy 3	1.000	1.000	A	4.000
SOCIOL	110-0	Introduction to Sociology	1.000	1.000	A	4.000
SPANISH	115-1	Accelerated Elementary Spanish	1.000	1.000	A	4.000

			Attempted	Earned	GPA Units	Points
Term GPA	4.000	Term Totals	4.000	4.000	4.000	16.000

2018 Spring (04/03/2018- 06/16/2018)

Program: Weinberg College of Arts & Sci
Plan: Undeclared Major

Course		Description	Attempted	Earned	Grade	Points
HISTORY	250-1	Global History I	1.000	1.000	A	4.000
HISTORY	317-2	Am Cult Hist 20th C. to Pres	1.000	1.000	A	4.000
PHIL	109-6	First-Year Seminar	1.000	1.000	A	4.000
Course Topic:		Fundamental Concepts of Politi				
SPANISH	115-2	Accelerated Elementary Spanish	1.000	1.000	A	4.000

			Attempted	Earned	GPA Units	Points
Term GPA	4.000	Term Totals	4.000	4.000	4.000	16.000

2018 Fall (09/27/2018- 12/15/2018)

Program: Weinberg College of Arts & Sci
Plan: Undeclared Major

Course		Description	Attempted	Earned	Grade	Points
ECON	202-0	Introduction to Microeconomics	1.000	1.000	A	4.000
HISTORY	300-0	New Lectures in History	1.000	1.000	A	4.000
Course Topic:		Technology and Society				
PHIL	150-0	Elementary Logic I	1.000	1.000	A	4.000
SPANISH	121-1	Intermediate Spanish	1.000	1.000	A-	3.700

			Attempted	Earned	GPA Units	Points
Term GPA	3.925	Term Totals	4.000	4.000	4.000	15.700

2019 Winter (01/07/2019- 03/23/2019)

Program: Weinberg College of Arts & Sci
Plan: History Major

Course		Description	Attempted	Earned	Grade	Points
HISTORY	315-3	US Since 1900:Late 20th C On	1.000	1.000	A	4.000
HISTORY	319-0	Hist of US Foreign Relations	1.000	1.000	A	4.000
PHIL	210-1	History of Philosophy 1	1.000	1.000	A	4.000
SPANISH	121-2	Intermediate Spanish	1.000	1.000	A	4.000

			Attempted	Earned	GPA Units	Points
Term GPA	4.000	Term Totals	4.000	4.000	4.000	16.000

2019 Spring (04/01/2019- 06/15/2019)

Program: Weinberg College of Arts & Sci
Plan: History Major

Course		Description	Attempted	Earned	Grade	Points
CLASSICS	212-0	Rome: Culture and Empire	1.000	1.000	A	4.000
HISTORY	393-0	Approaches to History	1.000	1.000	A	4.000
Course Topic:		Gender, Race, and the Holocaus				
PHIL	261-0	Intro to Political Phil	1.000	1.000	A	4.000
SPANISH	121-3	Intermediate Spanish	1.000	1.000	A-	3.700

			Attempted	Earned	GPA Units	Points
Term GPA	3.925	Term Totals	4.000	4.000	4.000	15.700

Northwestern University
633 Clark Street
Evanston, IL 60208
United States

Name: **Gelman,Elijah Nathan**
Student ID: **3025913**

Unofficial Transcript

2019 Fall (09/24/2019- 12/14/2019)

Program: Weinberg College of Arts & Sci
Plan: History Major

Course		Description	Attempted	Earned	Grade	Points
ASTRON	101-0	Modern Cosmology	1.000	1.000	A	4.000
HISTORY	378-0	Law and Science	1.000	1.000	A	4.000
PHIL	363-0	Kant's Moral Theory	1.000	1.000	A	4.000

			Attempted	Earned	GPA Units	Points
Term GPA	4.000	Term Totals	3.000	3.000	3.000	12.000

2020 Winter (01/06/2020- 03/21/2020)

Program: Weinberg College of Arts & Sci
Plan: History Major

Course		Description	Attempted	Earned	Grade	Points
CLASSICS	211-0	Greek History and Culture	1.000	1.000	A	4.000
HISTORY	300-0	New Lectures in History	1.000	1.000	A-	3.700
Course Topic:		Origins of Censorship				
HISTORY	318-1	US Legal/Constitution to 1850	1.000	1.000	A	4.000
HISTORY	395-0	Research Seminar	1.000	1.000	A	4.000
Course Topic:		Prob of Poverty in Anglo-Amer				

			Attempted	Earned	GPA Units	Points
Term GPA	3.925	Term Totals	4.000	4.000	4.000	15.700

A global health emergency during this term required significant changes to university operations that affected student enrollment and grading. Unusual enrollment patterns and grades during this period reflect the tumult of the time, not necessarily the work of individual students.

2020 Spring (04/06/2020- 06/13/2020)

Program: Weinberg College of Arts & Sci
Plan: History Major

Course		Description	Attempted	Earned	Grade	Points
PHIL	222-0	Introduction to Africana Philo	1.000	1.000	P	0.000
PHIL	266-0	Phil of Religion	1.000	1.000	P	0.000

			Attempted	Earned	GPA Units	Points
Term GPA	0.000	Term Totals	2.000	2.000	0.000	0.000

A global health emergency during this term required significant changes to university operations that affected student enrollment and grading. Unusual enrollment patterns and grades during this period reflect the tumult of the time, not necessarily the work of individual students.

Undergraduate Career Totals

Cum GPA	3.961	Cum Totals	33.000	33.000	31.000	122.800
Transfer Cum GPA		Transfer Totals	9.000	9.000	0.000	0.000
Combined Cum GPA	3.961	Comb Totals	42.000	42.000	31.000	122.800

Non-Course Milestones

WCAS Writing Proficiency Requirement Completed
Program: Weinberg College of Arts & Sci

End of Unofficial Transcript

NORTHWESTERN PRITZKER SCHOOL OF LAW

June 06, 2023

The Honorable Michael Brennan
United States Courthouse and Federal Building
517 East Wisconsin Avenue, Room 618
Milwaukee, WI 53202

Dear Judge Brennan:

I am pleased to have the opportunity to recommend Eli Gelman to you. I taught Mr. Gelman criminal law during the Fall of his 1L year. This Spring he enrolled in my Criminal Process class, a doctrinal course covering bail through habeas appeals.

That he is an outstanding student is clear from his transcript and his performance in my classes. Mr. Gelman earned an A+ in both Criminal Law and Criminal Process, each of which had a very demanding curve.

What his GPA cannot capture, however, is what makes working with Mr. Gelman a delight. In both classes, Mr. Gelman sat in the front row and I have realized this is a perfect metaphor for his approach to school and to life. He is deeply curious, eager to engage, and indefatigable. I could always count on him to respond to questions I posed to the class, whether about some detail in the court opinion or the larger policy issues implicated by these opinions. He listened thoughtfully to other students' positions and crafted his own views, unafraid of either voicing an unpopular opinion or revising his position. I have seldom worked with students so fully present in discussions of legal issues.

I have also seldom worked with students who are as genial as Mr. Gelman. He would greet me every morning before class, and we would chat about how he was doing. Law school is hard, but Mr. Gelman always found the energy for a wry or self-deprecating comment. He is a terrific student and good company. I am also confident that he will be an exceptional lawyer and colleague.

If you have any questions at all about Mr. Gelman, please do not hesitate to contact me. I believe he would be an outstanding addition to your chambers.

Respectfully,

Meredith Martin Rountree
Senior Lecturer
Northwestern Pritzker School of Law

Meredith Rountree - meredith.rountree@law.northwestern.edu - (312) 503-0227

APPELLATE COURT OF ILLINOIS

CHAMBERS OF
JUSTICE RAYMOND W. MITCHELL

160 NORTH LASALLE STREET
CHICAGO, ILLINOIS 60601
(312) 793-4483

May 15, 2023

Re: Elijah Gelman—Judicial Clerk Applicant

Dear Judge:

Your records should reflect that Elijah Gelman has applied for a judicial clerkship in your chambers. I write to highly recommend him for the position.

In the summer of 2022, Eli worked in my chambers as a judicial intern. Over that summer, I worked closely with Eli, and I can report that his work for me was superlative in every respect. Eli will make an outstanding judicial clerk, and I hope that you will consider him for the position.

I was a judge in the Chancery Division of the Circuit Court of Cook County, and in early July 2022, I become a judge on the Illinois Appellate Court. Eli worked with me in the trial court as well as at the appellate court. He functioned as an additional elbow clerk and assisted me in drafting opinions and conducting legal research.

Eli is a talented writer. He has superior analytic skills and has that rare ability to discuss complex legal issues with elegance and grace (both orally and in writing). His written work was of the highest caliber, displaying careful research and deep knowledge of the law.

Eli works in a diligent and efficient manner, and in our summer together, he produced a number of workmanlike opinion drafts. He has a seasoned, thoughtful approach to legal issues that one would expect to find in a lawyer many years his senior. He is exceptionally hard-working, and wholly unprompted, he frequently worked late. It is clear to me that Eli takes pride in his writing and is willing to put forth tremendous effort to deliver the very best work.

As you can see from Eli's academic record, he is very bright and has a first-rate intellect. I personally attest that his intelligence and discipline as a student directly correspond to those professional traits so valued in a judicial clerk.

On a more personal note, Eli has a pleasant demeanor and terrific sense of humor. He was well-liked by his peers, my staff and my judicial colleagues.

I highly recommend Eli for the judicial clerkship. If you would like to discuss Eli's application or any questions that you might have, I would be delighted to speak with you about this exceptional young man.

Sincerely,

RAYMOND W. MITCHELL

NORTHWESTERN PRITZKER SCHOOL OF LAW

June 06, 2023

The Honorable Michael Brennan
United States Courthouse and Federal Building
517 East Wisconsin Avenue, Room 618
Milwaukee, WI 53202

Dear Judge Brennan:

I am pleased to write a letter of recommendation for Eli Gelman in support of his application for a clerkship position in your chambers. Eli is an exceptionally bright and hardworking student. He is also kind, thoughtful, smart, well-mannered and intellectually curious. I believe he will be an exceptional clerk.

Eli's scholarly and professional demeanor is first-rate. I taught Eli during his first year of law school in my contracts class. Eli participated in class regularly. His comments were always thoughtful and polite. He was also a good listener who was also very attentive to his colleagues' comments. Unsurprisingly, Eli completed the class with an A and wrote the top exam in my contracts section of about sixty students. I subsequently nominated him for the Kirkland and Ellis Scholar as the student who had the highest grade in my contracts section. Indeed, I think his exam was one of the best-written examinations I have graded since I started teaching the first-year contracts course at Northwestern almost 18 years ago.

I was so impressed with Eli's performance in my contracts class that I decided to hire him as a teaching assistant when I taught the same course in the Fall of 2022. Again, Eli displayed not only incredible knowledge of the material but mature intellectual judgment as a teaching assistant. He had flexible weekly office hours, met with students regularly, had multiple exam review sessions, and had periodic study sessions for larger student groups. Whenever he had concerns about whether the students understood the material properly he promptly contacted me and made helpful suggestions about how I could review the class material. His assistance as a teaching assistant was indispensable. When I received the course evaluations from my contracts section I noticed that many students commented very favorably on Eli's role as a teaching assistant.

In addition to these achievements, Eli has also been very active in the law school and larger professional community. He currently serves as the Executive Editor of the Northwestern Law Review where he has honed his editorial skills. Eli also completed a judicial practicum last summer at the Illinois Appellate Court in the chambers of the Honorable Raymond Mitchell. From September 2020 until June 2021, he served as an intern at Chicago Appleseed Center for Fair Courts, where he helped research and draft a historical review of Chicago's efforts to install a police oversight system.

I cannot recommend Eli to you highly enough. He will make a superb law clerk. If there is any additional information I can provide that would help your consideration of Eli's application, please do not hesitate to contact me.

Respectfully,

Jide Okechuku Nzelibe
Howard and Elizabeth Chapman Professor of Law
Affiliated Faculty, Ford Motor Company Center for Global Citizenship
Northwestern Pritzker School of Law

Jide Nzelibe - j-nzelibe@law.northwestern.edu - (312) 503-5295

ELIJAH GELMAN
244 E. Pearson St., Apt. 912 Chicago, IL 60611 • elijah.gelman@law.northwestern.edu • (847) 323-3636

Writing Sample

This writing sample is a draft opinion that I wrote as an extern for Judge Raymond W. Mitchell in Illinois Appellate Court, First District, in July 2022. I was granted permission to use this draft opinion by Judge Mitchell.

No. 1-21-0850

2022 IL App (1st) _____
No. 1-21-0850

SIXTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

CITY OF CHICAGO, Plaintiff-Appellee, v. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL No. 9, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 2020 CH 05499 The Honorable Anna M. Loftus Judge, Presiding

PRESIDING JUDGE MITCHELL delivered the judgment of the court, with opinion.

OPINION

¶ 1 Defendant International Brotherhood of Electrical Workers, Local No. 9 appeals a circuit court's order granting City of Chicago's motion to vacate an arbitration award. The City had alleged that the arbitrator exceeded his jurisdiction, the award failed to draw its essence from the Collective Bargaining Agreement, and the award violated public policy. On appeal, IBEW argues the court erred in its application of the public policy exception when vacating the award. For the following reasons, we reverse the circuit court's order vacating the arbitration award.

No. 1-21-0850

¶ 2 I. BACKGROUND

¶ 3 Plaintiff City of Chicago entered into a Collective Bargaining Agreement with Defendant International Brotherhood of Electrical Workers, Local No. 9 effective from July 1, 2007 to July 30, 2017. On July 19th, 2009, in response to revenue issues caused by an economic recession, the City and IBEW entered into a Multi-Project Labor Agreement that amended the CBA. The PLA required anyone working on a project or in a jurisdiction covered by the CBA to sign onto the CBA and mandated all disputes under the PLA be resolved through arbitration.

¶ 4 City ordinances had established a permit system which allowed telecommunications companies to use City-owned public property to install their equipment in exchange for a fee. Municipal Code of Chicago, Ill. §§ 10-30-020, 10-30-040. On June 19, 2017, IBEW filed a grievance alleging the City had violated the CBA. IBEW alleged that the City had breached the CBA by permitting private, non-union telecommunications workers to work on City-owned traffic and light poles within IBEW's jurisdiction.

¶ 5 On July 10, 2017, IBEW advanced the grievance to arbitration. The parties agreed to let the arbitrator determine whether the CBA was breached and determine the remedy if needed. A hearing was held on January 12, 2018 and post-hearing briefs were filed on May 9, 2018.

¶ 6 The arbitrator issued his award in favor of IBEW on May 26, 2020. His award required the City to (1) stop granting permits to entities who used non-union workers and (2) ensure all entities who did work on the traffic and light poles signed the CBA:

> "The appropriate remedy is to:
>
> 1. Cease and desist from permitting entities which have not signed a collective bargaining agreement with the Union to perform distributive antennae

> system and other small cell technology work on City-owned light poles and traffic poles; and
>
> 2. Tale [*sic*] all necessary steps to ensure that entities performing distributive antennae system and other small cell technology work on City-owned light poles and traffic poles are or promptly become signatories to the applicable area-wide collective bargaining agreement for the purposes of performing that work ***."

¶ 7 On August 21, 2020, the City filed a motion to vacate the arbitration award. It argued the arbitrator exceeded his jurisdiction, the award failed to draw its essence from the CBA, and the award violated public policy. IBEW subsequently counterclaimed to have the award affirmed pursuant to the Uniform Arbitration Act. 710 ILCS 5/11 (West 2020).

¶ 8 On June 30, 2021, the circuit court granted the City's motion to vacate the arbitration award. The court's sole basis for vacating the award was that it violated the public policy of *Garmon* preemption. IBEW appealed.

¶ 9 II. ANALYSIS

¶ 10 The City originally argued in circuit court that the arbitrator exceeded his jurisdiction, the award failed to draw its essence from the CBA, and the award violated public policy. However, the City limits its submission on appeal to the public policy exception issue. Thus, the sole issue before this Court is whether the public policy exception warrants vacating the arbitration award.

¶ 11 "[T]he judicial review of an arbitral award is extremely limited." *American Fed'n of State, Cnty. & Mun. Emp.'s v. Department of Cent. Mgmt. Serv.'s*, 173 Ill. 2d 299, 304 (1996). This limited review reflects the legislature's intent "to provide finality for labor disputes submitted to arbitration." *Id*; see 710 ILCS 5/12 (West 2020). A court may not search the arbitral record for errors of law or fact. *Chicago Transit Auth. v. Amalgamated Transit Union Local 308*, 244 Ill.

App. 3d 854, 863 (1st Dist. 1993). Unless the award is mistaken on its face, not even "[g]ross errors of judgment in law or a gross mistake of fact" are grounds for vacatur. *Rauh v. Rockford Prod.'s Corp.*, 143 Ill. 2d 377, 393 (1991). Awards are presumed valid and are construed to uphold their validity when possible. *Id.* at 387. Thus, in most cases, a court is "duty bound" to enforce an arbitration award "if the arbitrator acts within the scope of his or her authority and the award draws its essence from the parties' collective-bargaining agreement." *AFSCME*, 173 Ill. 2d at 304-05.

¶ 12 However, Illinois courts recognize "a public policy exception" that can "vacate arbitral awards which otherwise derive their essence from a collective-bargaining agreement." *AFSCME*, 173 Ill. 2d at 306. The public policy exception requires a court to vacate awards that "are repugnant to established norms of public policy." *Id.* at 307. The exception is narrow; "the contract, *as interpreted* by the arbitrator, must violate some explicit public policy." (Emphasis in original). *Id.* An explicit public policy is considered violated only when (A) "a well-defined and dominant public policy can be identified" and (B) said policy is violated by the arbitrator's award. *Id.* at 307-08. Whether an award violated public policy is a question of law, which is reviewed *de novo*. *City of Chicago v. Fraternal Ord. of Police*, 2020 IL 124831, ¶ 26.

¶ 13 A. Well-Defined and Dominant Public Policy

¶ 14 To determine whether a public policy is well-defined and dominant, a court first looks to the "constitution and *** statutes," then to "judicial decisions and the constant practice of the government officials." *AFSCME*, 173 Ill. 2d at 307 (quoting *Zeigler v. Illinois Tr. & Sav. Bank*, 245 Ill. 180, 193 (1910)). The City argues the public policy at stake is *Garmon* preemption, a judicial doctrine that "forbids state and local regulation of activities the [National Labor Relations Act] protects or prohibits or arguably protects or prohibits." *Cannon v. Edgar*, 33 F.3d

880, 884 (7th Cir. 1994) (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959)). IBEW insists that *Garmon* preemption cannot be considered a well-defined and dominant public policy due to it being federal policy. Citing several cases that only look at state law when determining whether a well-defined and dominant public policy exists, IBEW argues that the public policy exception is limited to policies expounded by the Illinois Constitution, state laws, and state court decisions.

¶ 15 *Zeigler*, the Illinois Supreme Court case cited by IBEW and many of its cases, belies its point, as it confirms federal policy can be considered depending on the circumstances of the case:

> "Each case, as it arises, must be judged and determined according to its own peculiar circumstances. The public policy of the state *or of the nation* is to be found in its Constitution and its statutes, and when cases arise concerning matters upon which they are silent, then its judicial decisions and the constant practice of the government officials." (Emphasis added).

Zeigler, 245 Ill. at 193.

¶ 16 No subsequent Illinois Supreme Court case has changed this standard, and many of the cases cited reaffirm it. *American Fed'n of State, Cnty. & Mun. Emp.'s v. State*, 124 Ill. 2d 246, 260 (1988) ("The public policy of a State *or nation* must be determined by its constitution, laws and judicial decisions." (Emphasis added)); *Department of Cent. Mgmt. Serv.'s v. American Fed'n of State, Cnty. & Mun. Emp.'s*, 245 Ill. App. 3d 87, 94 (4th Dist. 1993) (same); *Board of Educ. of Sch. Dist. U-46 v. Illinois Educ. Lab. Rel.'s Bd.*, 216 Ill. App. 3d 990, 999 (4th Dist. 1991) (same). The lack of federal policy in these cases' analyses does not mean they stand for the contradictory proposition that federal policy is inapplicable. As stated in *Zeigler*, "each case

*** must be judged and determined *according to its own peculiar circumstances*." (Emphasis added). *Zeigler*, 245 Ill. at 193. The cases that emphasize state law simply had circumstances in which state law was applicable to the point that an analysis of federal law would be superfluous. See, *e.g.*, *City of Chicago v. Fraternal Ord. of Police*, 2020 IL 124831, ¶ 34 (stating that since the motion to vacate the arbitration award was "substantiated on establishing a direct conflict between a provision of the CBA and statutory requirements" of the state's Local Records Act, the court "need not look further than the plain language of the statute" to determine whether the public policy exception applied).

¶ 17 The only case IBEW cites that explicitly dismisses federal public policy arguments while evaluating an arbitration award is the federal case from the Northern District of Illinois *Chicago Bears Football Club, Inc. v. Haynes*. However, *Haynes* did not find all federal law to be categorically irrelevant; rather, the court found that the defendants failed to provide cases that "evince[] an 'explicit,' 'well-defined,' and 'dominant' federal labor policy" that could vacate the award at issue. *Chicago Bears Football Club, Inc. v. Haynes*, 816 F. Supp. 2d 534, 540 (N.D. Ill. 2011). The *Haynes* court's willingness to consider whether there was a well-defined and dominant federal labor policy further indicates that the public policy exception includes federal policy.

¶ 18 IBEW's final argument for why this Court should not consider federal policy is that it would invite parties to move to vacate arbitrator's final awards based on laws and court decisions from other jurisdictions, undermining the arbitration process. This slippery-slope argument fails to recognize that federal law has jurisdiction over state law. U.S. Const. art. VI, cl. 2 (Supremacy Clause) ("[T]he Laws of the United States *** shall be the supreme Law of the Land.").

Accordingly, the federal public policy of *Garmon* preemption is a well-defined and dominant public policy that can be considered.

¶ 19 B. Violation by the Award

¶ 20 Once a well-defined and dominant public policy has been identified, the next question is "whether the contract in this case, as interpreted by the arbitrator, clearly violates that policy." *AFSCME*, 173 Ill. 2d at 317. *Garmon* preemption "forbids state and local regulation of activities the NLRA protects or prohibits or arguably protects or prohibits." *Cannon*, 33 F.3d at 884. Sections 157 and 158 of the NLRA protect the right to participate or refrain from participating in labor unions:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities ***."

29 U.S.C. § 157.

> "It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> ***
>
> (3) [to] discriminat[e] in regard to hire or tenure of employment or [for] any term or condition of employment to encourage or discourage membership in any labor organization ***."

29 U.S.C. § 158.

¶ 21 Thus, the essential question in this case is whether the arbitrator's award, which mandates only union workers be granted permits to use City property, constitutes a local regulation that interferes with the right to refrain from participating in labor unions.

¶ 22 C. The Market Participant Exception

¶ 23 IBEW argues *Garmon* preemption does not apply based on the "market participant" exception. The U.S. Supreme Court articulated this exception as follows:

> "When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state *regulation*." (Emphasis in original).

Building & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I. (Boston Harbor), 507 U.S. 218, 227 (1993).

¶ 24 It does not appear that Illinois courts have ever addressed this exception, and federal circuits are split on its application. The Third Circuit requires a government *both* (1) act to advance a proprietary interest *and* (2) tailor its actions to avoid a regulatory effect. *Associated Builders & Contractors Inc. N.J. Chapter v. City of Jersey City*, 836 F.3d 412, 418 (3d Cir. 2016). The Seventh Circuit does not require the government to have any proprietary interest, instead only requiring that government action not amount to regulation. *Northern Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1006 (7th Cir. 2005). Finally, the Ninth Circuit only requires the government *either* (1) act to advance a proprietary interest *or* (2) tailor its actions to avoid a regulatory effect. *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1024 (9th Cir. 2016).

¶ 25 This Court need not resolve this split, as no matter what circuit's test is chosen the result is the same: the award's union requirement does not amount to regulation. First, the benefits the City receives through the permit process advances its proprietary interest in the ownership and management of its poles. As the arbitrator states, the City's rules for issuing permits not only mandate they receive fees ranging from $1500 to $3000, but it also requires telecommunications companies to relinquish ownership of innerducts installed and reserves a certain amount of wires installed for City use. The City has no grounds to argue that these rules do not further their ownership and management of the poles, as the ordinance which established this permit process requires these rules only be enacted if "necessary to *** *manage* the public ways ***." (Emphasis added). Municipal Code of Chicago, Ill. § 10-30-050. Whether or not the City has a proprietary interest in the telecommunications companies themselves is irrelevant considering how much this permit process advances the City's proprietary interest in their property.

¶ 26 Second, the award's union requirement is sufficiently tailored to avoid a regulatory effect. A government acts as a regulator when "it performs a role that is characteristically a governmental rather than a private role ***." *Boston Harbor*, 507 U.S. at 229. Courts often inquire into the intent of government action to determine whether regulation is occurring. See *Chamber of Com. of U.S. v. Brown*, 554 U.S. 60, 70 (2008) ("[W]hen a State acts as a 'market participant with no interest in setting policy,' as opposed to a 'regulator,' it does not offend the pre-emption principles of the NLRA." (quoting *Boston Harbor*, 507 U.S. at 229)). However, the dispositive factor is regulatory effect; "Federal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment." (Emphasis in original). *Lavin*, 431 F.3d at 1007.

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¶ 27 The City argues the award's requirement that permits can only be given to union members must be considered regulatory because government restrictions on access to public property is regulatory. Its argument rests on the Ninth Circuit case *City of Portland v. United States*. In *Portland*, several local governments controlled access to public poles in ways that "materially inhibit[ed]" private telecommunications companies' use of city property. *City of Portland v. United States*, 969 F.3d 1020, 1035 (9th Cir. 2020). The Federal Communications Commission, acting under the authority of the Telecommunications Act, attempted to regulate the ways local governments could restrict access to public poles. *Id.* at 1034. Local governments argued they had the absolute right to control access to public poles because they were acting like private property owners rather than regulators, making preemption under the Telecommunications Act inapplicable. *Id.* at 1045. The FCC disagreed, stating that "municipalities, in controlling access to rights-of-way, are not acting as owners of the property; their actions are regulatory, not propriety [*sic*], and therefore subject to preemption." *Id.* The court agreed, further adding that "the rights-of-way, and manner in which the municipalities exercise control over them, serve a public purpose, and they are regulated in the public interest, not in the financial interest of the cities ***." *Id.*

¶ 28 This case is distinguishable in that *Portland* concerns the Telecommunications Act, a completely different act than the NLRA. The key difference between these two acts is that the NLRA has no explicit preemption clause and is thus enforced through judicial preemption doctrines like *Garmon*, while the Telecommunications Act has an explicit preemption clause that tasks the FCC with enforcement. 47 U.S.C. § 253(d). This seemingly subtle distinction creates a material difference in how a court analyzes preemption under the two acts, as a court is expected to show deference to an agency's interpretations. See *Portland*, 969 F.3d at 1037 ("Where terms

of the Telecommunications Act are ambiguous, we defer to the FCC's reasonable interpretations." (citing *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984)). Thus, the Ninth Circuit did *not,* as the City claims, conclude that all government restrictions on access to public property are regulation. Rather, the Ninth Circuit found that *the FCC's determination* that restrictions on access to public property are regulation "is a reasonable conclusion based on the record." *Id.* at 1045.

¶ 29 Is this conclusion, that all restrictions on public property amount to regulation, reasonable based on *our* record? We think not. As stated above, the City is being paid fees in exchange for permitting telecommunications companies to access public poles. While these poles may serve the public purposes of lighting and directing traffic when used by the City, they serve no public purpose when used by the private telecommunications companies, as those companies use them solely for their own cell networks. The City is pursuing a financial interest, not a public one, when it allows private companies to use its property for private purposes.

¶ 30 Moreover, even if the award's union requirement would be impermissible regulation on a large scale, the tailoring of the award avoids this consequence. *Northern Ill. Chapter of Associated Builders & Contractors, Inc. v. Lavin* illustrates how properly tailored requirements do not amount to regulation. In *Lavin*, Illinois conditioned subsidies for renewable-fuel plants on signing a CBA. *Lavin*, 431 F.3d at 1005. The Seventh Circuit found these conditional subsidies were not a form of regulation and thus qualified for the market participant exception. *Id.* at 1006. The court reasoned that while conditions "may become regulation if they affect conduct other than the financed project *** [b]ecause Illinois ha[d] limited its condition to the project financed by the subsidy, it ha[d] not engaged in 'regulation' ***." *Id.* at 1006-07.

¶ 31 In this case, the arbitrator was clear that the union requirement only applies to permits for work done on city property, stating that he "do[es] not understand the Union's grievance to extend to any off-site work." The award itself further limits the award's union requirement to only apply to companies that "perform distributive antennae system and other small cell technology work on City-owned light poles and traffic poles." In limiting the union requirement not only to City property, but to specific small cell technology work on that property, the award has limited its possible regulatory effect to a specific project. Thus, the permit's union requirement does not have the far-reaching regulatory effect that would make it regulation.

¶ 32 Therefore, with the award's union requirement both advancing the City's proprietary interest and being tailored to avoid a regulatory effect, the City is acting as a market participant. The public policy of *Garmon* preemption is not violated.

¶ 33 D. The Telecommunications Act

¶ 34 The City also argues, for the first time on appeal, that the arbitration award violates the public policy of the Telecommunications Act. "It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal." *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996). This prohibition on raising new arguments applies in full-force to vacatur appeals. *Forest Pres. Dist. of Cook Cnty. v. Illinois Fraternal Ord. of Police Lab. Council*, 2017 IL App (1st) 161499, ¶ 26. Federal preemption arguments are not an exception to this rule. *Haudrich*, 169 Ill. 2d at 537.

¶ 35 The only argument the City makes for considering this new public policy is that the argument is supported by the record. The record only shows a public policy argument based on *Garmon* preemption. No part of the record below supports a specific public policy argument based on the Telecommunications Act. An argument based on one specific federal public policy

at trial court cannot be considered to preserve for appeal all arguments based on any federal public policy.

¶ 36 Nonetheless, even if we were to consider this argument, the Telecommunications Act would not warrant vacating the award. As stated above, an explicit public policy is considered violated only when (A) "a well-defined and dominant public policy can be identified" and (B) said policy is violated by the arbitrator's award. *AFSCME*, 173 Ill. 2d at 307-08. The Telecommunications Act's stated public policy is to prevent local governments from "prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). However, the City notes that the FCC has further defined this policy through several recent orders. The FCC has prioritized ensuring access to public poles, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrasture Investment*, 33 FCC Rcd. 7705, § 1 (2018); limited the fees governments can impose in exchange for access, *Small Cell Order*, 33 FCC Rcd. 9088, § 50 (2018); required governments to act "within a reasonable period of time" on any request to install telecommunications services, *Id.* § 132; and prohibited categorical denials of telecommunications companies' requests to use public property, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 35 FCC Rcd. 7936, § 8 (2020).

¶ 37 A well-defined and dominant public policy does not rest on a hodge-podge of newly-enacted agency orders. As stated earlier, the public policy exception is meant to vacate awards that "are repugnant to *established norms* of public policy." (Emphasis added). *AFSCME*, 173 Ill. 2d at 307. These orders, the oldest cited being enacted a mere four years ago, are far from established. Their policy is also ill-defined, as seen by the Ninth Circuit vacating parts of

the *Small Cell Order* due to it being "neither adequately defined nor its purpose adequately explained." *Portland*, 969 F.3d at 1043.

¶ 38 Finally, even if this Court were to find a well-defined and dominant public policy buried within these orders, the award would not violate it. While the FCC orders contain a mix of general declarations of policy goals and specific prohibitions on certain regulations, they have not once ruled on whether a union requirement would violate the Telecommunications Act. "Arbitration awards should be construed, wherever possible, so as to uphold their validity." *Rauh*, 143 Ill. 2d at 386. Vacating the award on an inference that it *may* violate the Telecommunications Act would require incorrectly construing the award against validity. Accordingly, the public policy of the Telecommunications Act is not violated. Therefore, we reverse the circuit court's order.

¶ 39 III. CONCLUSION

¶ 40 Arbitration is meant to be the end of litigation. For an award to be vacated on public policy grounds, the public policy must not only be well-defined and dominant, but also clearly violated by the arbitrator's award. Neither of the City's public policy arguments fulfilled both these requirements. Therefore, the circuit court's order vacating the arbitration award is reversed.

¶ 41 Reversed.

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Writing Sample

This writing sample is a draft of my paper I wrote for in the 2022 fall semester for my Seminar on Juries at Northwestern Pritzker School of Law. It is expected to be published in Northwestern University Law Review as a note in 2023. In the note, "Hung Out to Try: A Rule 29 Revision to Stop Hung Jury Retrials," I argue for a new standard for judges to use when deciding whether the evidence presented at trial was insufficient to convict after a hung jury.

Hung Out to Try: A Rule 29 Revision to Stop Hung Jury Retrials

Abstract

How many times can a defendant be retried? For those facing hung jury retrials, it's as many times as the government pleases. The Supreme Court has consistently held that as long as no verdict is reached, double jeopardy prohibitions do not apply. Since a hung jury occurs when the jurors fail to reach a verdict, no verdict exists to prevent the government from retrying the defendant.

There is, theoretically, a built-in procedural solution to stop the government from endlessly retrying defendants. Rule 29 of the Federal Rules of Criminal Procedure gives federal judges the power to acquit defendants "for which the evidence is insufficient to sustain a conviction." Considering that a hung jury indicates the jurors could not agree on whether the evidence was sufficient, defendants facing post-hung jury retrials are prime candidates for this rule's application.

Yet the rule has not been applied as written. Instead, the Supreme Court has given a government-biased standard for deciding whether there is insufficient evidence to convict, stating that a judge must consider the evidence in the "light most favorable" to the government. The standard forces judges to ignore a jury's inability to reach a verdict and instead look solely at the evidence presented with rose-tinted glasses. This creates a hole in the law when cases involve evidence that is technically sufficient under this heavily biased standard but too weak to convince a fully jury. Yet no matter how many times a jury is incapable of unanimously finding evidence sufficient to convict, the judge's insufficient evidence determination remains unaffected. A standard that forces judges to nonsensically conduct the same analysis over and

over again when juries repeatedly indicate that evidence is too insufficient to reach a verdict is not a functioning insufficient evidence standard.

This Note proposes a new post-hung jury Rule 29 standard. Rather than viewing the evidence in the light most favorable to the government, a judge should view the evidence in the light it was actually seen by the juries who hung, with no bias toward the government. Doing so allows a judge to consider a jury's inability to reach a verdict as probative evidence that the evidence is insufficient, preventing the government from unduly retrying cases where multiple juries have failed to convict. Best of all, a Rule 29 acquittal cannot be appealed, meaning this new standard can be applied today even without the approval of appellate courts.

Introduction

"[L]ook me in the eye and explain to me why the government is going to retry this case."[1] These words came from an exasperated Judge Phillip Brimmer upon hearing that the government planned to retry *United States v. Penn*, a case in which broiler chicken industry executives were charged with conspiring to fix prices.[2] The case had already been tried two times, and two times the juries hung.[3] Judge Brimmer was doubtful that the government could secure any convictions in a third trial: "We know that the evidence couldn't persuade 12 people . . . . We've seen it happen twice."[4]

Despite Judge Brimmer's hesitance to try the case again, a third trial commenced.[5] Following the deliberations, the jury found the defendants not guilty.[6] It took three trials and twenty-one weeks of total trial time[7] for the justice system to officially conclude what two juries had already signaled: there was insufficient evidence to convict.[8]

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[1] Greg Henderson, *Second Mistrial in Poultry Price–Fixing Case*, DROVERS (Mar. 30, 2022), https://www.drovers.com/news/industry/second-mistrial-poultry-price-fixing-case.

[2] *Id.*

[3] *Id.*

[4] Greg Henderson, *"Not Guilty"—Chicken Price-Fixing Trial Ends*, DROVERS (July 8, 2022), https://www.drovers.com/news/industry/not-guilty-chicken-price-fixing-trial-ends.

[5] *Id.*

[6] *Id.*

[7] Rich Kornfeld, *Playing Chicken: DOJ Presses on with High-Profile Antitrust Cases Despite Series of Defeats*, CORP. COMPLIANCE INSIGHTS (Aug. 31, 2022), https://www.corporatecomplianceinsights.com/antitrust-doj-chicken-price/.

[8] The government's insistence on retrying the case a third time was "virtually unprecedented." Matthew Perlman & Bryan Koenig, *Despite 2 Mistrials, DOJ Won't Say Chicken Case Is Done*, LAW360 (Mar. 31, 2022, 7:31 PM), https://www-law360-com.turing.library.northwestern.edu/articles/1479309/despite-2-mistrials-doj-won-t-say-chicken-case-is-done ("I'm not aware of any precedent for a third attempted trial in a criminal antitrust case—ever.") This is because federal principles of federal prosecution require "prosecutors to have a good-faith belief they have at least a 50% chance of winning if they go to trial." *Id.* Yet these principles, geared at ensuring success at trial, have taken a backseat to political considerations. *See* Ankush Khadori, *Is the Justice Department Incompetent?*, N.Y. MAG. (May 19, 2022) https://nymag.com/intelligencer/2022/05/is-the-justice-department-incompetent.html ("The antitrust losses all seem to have involved prosecutions with conspicuously thin factual evidence . . . . [T]his may be the result of a poorly conceived effort to use criminal prosecutions to send a message to alter behavior throughout the labor market or the growing pains of a new enforcement regime with dubious ideological and perhaps even political underpinnings."); Kornfeld, *supra* note 7 ("[T]he DOJ antitrust focus appears to be informed as much by political considerations as legal ones.").

Could the clearly skeptical Judge Brimmer have stopped this third, meaningless trial? As I explain below, the answer is currently "no." While one might assume the Constitution prevents a defendant from being "twice put in jeopardy" for the same offense,[9] the Supreme Court long ago concluded that hung jury retrials do not violate the Double Jeopardy Clause.[10] Without this double jeopardy protection, defendants facing multiple retrials post-hung jury are at the whim of a government that can choose to retry the case as many times as the jury hangs.[11]

The Federal Rules of Criminal Procedure do have a solution to stop the government from endlessly retrying frivolous cases. Rule 29 allows the judge to acquit a defendant "for which the evidence is insufficient to sustain a conviction."[12] Yet while hung juries could be considered probative in determining that the evidence is insufficient to convict, the current insufficient evidence standard only allows judges to consider evidence from a perspective that markedly favors the government, that is, in the "light most favorable" to the government.[13] Putting a thumb on the scale in the government's favor significantly blunts the impact of a rule designed to address fairness, efficiency, and overzealous prosecution concerns. Thus, even this built-in solution has been foreclosed to defendants facing retrial after a hung jury.

This government-biased standard is not relegated to the federal courts. Several states have adopted substantially similar insufficient evidence rules and adopt the federal "light most favorable" standard.[14] Considering the wide majority of criminal trials occur in state court, a less

[9] U.S. CONST. amend. V.
[10] *See* United States v. Perez, 22 U.S. 579, 580 (1824).
[11] FED. R. CRIM. P. 31(b)(3) ("The government may retry any defendant on any count on which the jury could not agree.").
[12] FED. R. CRIM. P. 29.
[13] *See* 26 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE—CRIMINAL PROCEDURE, § 629.05 (Matthew Bender ed., 3d ed. 2022).
[14] *See infra* Part IV.

government-favored insufficient evidence standard would provide relief to defendants caught in hung jury retrials.[15]

This Note argues for a new Rule 29 standard in the wake of a hung jury. Part I explains how the current Double Jeopardy Clause doctrine fails to prevent hung jury retrials and considers the pitfalls in two previously proposed solutions. Part II introduces Rule 29 and explains why the current insufficient evidence standard fails to stop hung jury retrials. Part III proposes a new insufficient evidence standard that provides judges more power to stop retrials after a hung jury. Part IV considers how this new standard could be applied in state courts, and Part V considers critiques of this proposed standard.

I. The Double Jeopardy Roadblock

Part I examines the current state of the law concerning defendants facing hung jury retrials. First, it analyzes the Supreme Court's Double Jeopardy Clause precedent and how it fails to protect defendants facing retrials after a hung jury. Second, it considers two previous proposals that have attempted to provide greater protections to post-hung jury defendants: reinterpreting the Double Jeopardy Clause precedent and utilizing judges' inherent authority to stop retrials.

A. The Doctrine

The Supreme Court has consistently held that the Double Jeopardy Clause is not violated by retrials after a hung jury. The foundational case is *United States v. Perez*, in which Justice Joseph Story declared that a hung jury implicates the "manifest necessity" to discharge the jury, declare a mistrial, and retry the defendant in order to achieve "the ends of public justice."[16] The single paragraph, 444-word opinion failed to elaborate on what this "manifest necessity"

[15] Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 757 (2004).
[16] United States v. Perez, 22 U.S. 579, 580 (1824).

standard entailed, nor did it explain why the "ends of public justice" warranted circumventing the Double Jeopardy Clause. Despite this dearth of analysis, *Perez*'s holding went unquestioned by the Court for the next one-hundred-and-fifty years.[17] Citations to *Perez* became routine; it had been upheld so many times that the Court never felt the need to justify its holding.[18]

This changed in *Richardson v. United States*.[19] The Court had found itself in a doctrinal bind. Six years prior to *Richardson*, a unanimous Supreme Court held in *Burks v. United States* that the Double Jeopardy Clause barred retrials if a judge deemed the evidence insufficient to convict.[20] The implications on hung jury retrials were obvious; if a judge's determination that there was insufficient evidence prohibited retrials, why wouldn't a hung jury's inability to find the evidence sufficient to convict also implicate the Double Jeopardy Clause? That was the question the Court was forced to answer in *Richardson*. In order to shore up *Perez*'s holding in the face of *Burks*, Justice William Rehnquist gave a novel explanation for why hung juries do not implicate the Double Jeopardy Clause, stating that a hung jury is not a verdict that "terminates the original jeopardy."[21] Yet even this new reasoning relied on old crutches. When pushed to explain *why* a hung jury failed to terminate jeopardy, Justice Rehnquist's only response was that holding otherwise would contradict previous cases like *Perez*: "[T]his proposition [that a hung jury terminates jeopardy] is irreconcilable with cases such as *Perez* . . . and we hold on the authority of these cases that the failure of the jury to reach a verdict is not an event which

[17] *See, e.g.*, Dreyer v. Illinois, 187 U.S. 71, 85–86 (1902) ("[W]hat was said in *United States v. Perez* is applicable to this case . . . and is adverse to the contention of the accused that he was put twice in jeopardy."); Wade v. Hunter, 336 U.S. 684, 688 (1949) ("Past cases have decided that a defendant, put to trial before a jury, may be subjected to the kind of 'jeopardy' that bars a second trial for the same offense even though his trial is discontinued without a verdict."); Arizona v. Washington, 434 U.S. 497, 509 (1978) ("[W]ithout exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial.").

[18] *See* Janet E. Findlater, *Retrial After a Hung Jury: The Double Jeopardy Problem*, 129 U. PA. L. REV. 701, 701 (1981) ("[The] Court has held that the double jeopardy clause . . . does not bar retrial following a hung jury. It has done so consistently, without discussion of the issue, by peremptory citation to . . . *Perez*.").

[19] 468 U.S. 317 (1984).

[20] 437 U.S. 1, 18 (1978).

[21] *Richardson*, 468 U.S. at 325.

terminates jeopardy."[22] Justice Rehnquist was not shy in admitting that his majority opinion relied more on precedent than reasoning. Rather, he embraced it, stating that "a page of history is worth a volume of logic."[23]

This continued reliance on the authoritativeness of *Perez*, devoid of critical analysis, has given the now two-century-old case a life of its own.[24] Hung juries are no longer just the first example of the manifest necessity to discharge a jury; they are now the "prototypical example" of the manifest necessity that allows for retrials.[25] In its current state, the Double Jeopardy Clause doctrine provides no relief for defendants facing retrials after a hung jury. Legal scholars have proposed multiple ways to circumvent this ossified doctrine and prevent undue retrials. I survey some here.

B. Reinterpreting Precedent

One suggestion is for the Supreme Court to outright reject *Perez*'s manifest necessity exception to the Double Jeopardy Clause.[26] Despite the Court's continued reliance on *Perez*, its holding is incongruent with the purpose of the Double Jeopardy Clause. First, retrials after a hung jury implicate the same ordeals the Double Jeopardy Clause is meant to protect against. Justice Hugo Black described the purpose of the Double Jeopardy Clause as follows:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[27]

[22] *Id.*
[23] *Id.* at 325–26.
[24] *Perez* continues to be authoritatively cited into the 21st century. *See, e.g.*, Yeager v. United States, 557 U.S. 110, 118 (2009); Blueford v. Arkansas, 566 U.S. 599, 609 (2012).
[25] Oregon v. Kennedy, 456 U.S. 667, 672 (1982).
[26] Findlater, *supra* note 18, at 736–37.
[27] Green v. United States, 355 U.S. 184, 187–88 (1957).

The "embarrassment," "expense," "ordeal," "anxiety," and "insecurity" all exist when a defendant is retried after a hung jury.[28] The possibility of a wrongful conviction also increases with further trials, as each subsequent retrial drains the defendant's resources and increases the chance of a more prosecution-friendly jury.[29] If the defendant is under pretrial detention, the immense costs of prolonged detention are further imposed on a potentially innocent defendant.[30] *Perez*'s manifest necessity exception ignores all of these burdens.

Second, *Perez*'s holding is so far outside the bounds of the Double Jeopardy Clause that scholars have questioned its precedential value. Justice Story's opinion never mentioned the Double Jeopardy Clause or even the Constitution, calling into question whether *Perez* really was about the Double Jeopardy Clause.[31] Professor Janet E. Findlater argues that *Perez* is better read as deciding whether a judge could discharge a jury prior to a verdict *at all*, as discharging juries before they reached a verdict had been controversial at common law.[32] If *Perez* were to be reinterpreted as solely addressing the issue of discharging a jury, then this foundational case would no longer support the conclusion that hung juries do not violate the Double Jeopardy Clause, and the manifest necessity exception would no longer make retrials after hung juries immune to double jeopardy protection.

Unsurprisingly, the Supreme Court has not been willing to disturb such a bedrock Double Jeopardy Clause principle. The Court has already acknowledged that *Perez* is likely not a Double

[28] *See* Findlater, *supra* note 18, at 713 ("The emotional, physical, psychological and economic harm visited by a repetition of trials is obvious.").

[29] *Id.*; Carrie Leonetti, *When the Emperor Has No Clothes II: A Proposal for a More Serious Look at "The Weight of the Evidence,"* 7 N.Y.U. J.L. & LIBERTY 84, 120–21 (2013).

[30] Leonetti, *supra* note 29, at 122–23 ("[T]he defendant bears significant burdens as the result of the ongoing detention: stigma; the isolation of being cut off from friends and family; loss of employment; loss of liberty; the impairment of the ability to mount an effective defense; the degradations of imprisonment; and threats from other inmates, violence, or even rape . . . .").

[31] Findlater, *supra* note 18, at 709 ("*Perez* did not involve application of the double jeopardy clause . . . ."); Crist v. Bretz, 437 U.S. 28, 34 n.10 (1978) ("[A] close reading of the short opinion in [*Perez*] could support the view that the Court was not purporting to decide a constitutional question . . . .").

[32] Findlater, *supra* note 18, at 705–06 ("At common law it was a rule of practice that a jury once sworn could not be discharged before a verdict was returned.").

Jeopardy Clause case and shrugged off the insight as insignificant: "[T]o cast such a new light on *Perez* at this later date would be of academic interest only."[33] Moreover, even if the Supreme Court's precedents are faulty, it still has good reason to avoid ruling retrials after hung jury mistrials violate the Double Jeopardy Clause. If a retrial after a hung jury implicated double jeopardy, a blanket rule would be established that would make any hung jury retrial unconstitutional. One oft-cited risk of such a rule is that it would allow one unreasonable juror to hang a jury and prevent future retrials, robbing the government and public of justice.[34] While the concept that juries often hang because of one intransigent juror has been contested,[35] the public still has an "interest in fair trials designed to end in just judgments."[36] For these reasons, this Note does not argue for a blanket prohibition against retrials after hung juries. The current Double Jeopardy Clause standard may unduly ignore the interests of defendants, but a solution that ignores government and public interest a is not much of an improvement.

C. Inherent Authority

Another suggestion is for federal district court judges to use their inherent authority to stop undue retrials after a hung jury.[37] The theory that district court judges have inherent supervisory authority over criminal justice originates from *McNabb v. United States*.[38] In *McNabb*, the Supreme Court held it has "supervisory authority over the administration of criminal justice in federal courts," allowing it to create restrictions on criminal justice beyond

[33] *Crist*, 437 U.S. at 34 n.10; *see also* Richardson v. United States, 468 U.S. 317, 324 (1984) ("We are entirely unwilling to uproot this settled line of cases . . . .").

[34] Michael A. Berch & Rebecca White Berch, *The Power of the Judiciary to Dismiss Criminal Charges After Several Hung Juries: A Proposed Rule to Control Judicial Discretion*, 30 LOY. L.A. L. REV. 535, 541 (1997); *see also* Jeffrey Rosen, *After 'One Angry Woman'*, 1998 U. CHI. LEGAL F. 179, 180 (1998) ("[P]rosecutors suggested that they had observed a rise in hung juries, in which a lone hold out . . . refused to convict . . . .").

[35] Hannaford-Agor, Valerie P. Hans, Nicole L. Mott & G. Thomas Munsterman, *Are Hung Juries a Problem?*, NAT'L INST. JUST. 67 (2002) (finding in their empirical study of state courts that the majority of hung juries have more than two holdout jurors).

[36] *Richardson*, 468 U.S. at 325 (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)).

[37] Berch & Berch, *supra* note 34, at 564.

[38] 318 U.S. 332, 341 (1943).

what the Constitution provides.[39] While *McNabb* only confirmed the Supreme Court's inherent authority, lower federal courts have invoked their inherent authority over criminal justice as well.[40] In the context of hung juries, the Supreme Court in *Arizona v. Washington* hinted at a federal court's inherent authority to stop retrials even if the Double Jeopardy Clause permits them.[41] Justice John Paul Stevens stated that "[e]ven if the first trial is not completed, a second prosecution may be grossly unfair" due to it implicating the same issues the Double Jeopardy Clause is meant to protect against: "[A second prosecution] increases the financial and emotional burden on the accused, prolongs the period in which [the defendant] is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted."[42]

Some district courts have found an inherent authority to stop "grossly unfair" retrials after multiple hung juries. In *United States v. Ingram*, the D.C. District Court sua sponte dismissed an indictment with prejudice after two trials resulted in hung juries.[43] When the government challenged the court's power to dismiss the indictment on reconsideration, the district court rejected the challenge, stating that their "intervention [was] required in the interests of justice" and it was "simply a matter of fair play" that the government receive no more chances to convict.[44] In *United States v. Rossoff*, the Central District Court of Illinois was faced with a similar situation, as two trials resulted in hung juries on five of the thirteen criminal counts.[45] Citing *Ingram*, the court sua sponte dismissed with prejudice the remaining five counts, stating

[39] *Id.* at 341.
[40] Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1433 (1984) (noting that following McNabb "lower federal courts . . . employed supervisory power in hundreds of cases").
[41] Arizona v. Washington, 434 U.S. 497, 503–04 (1978).
[42] *Id.*
[43] United States v. Ingram, 412 F. Supp. 384, 385 (D.D.C. 1976).
[44] *Id.*
[45] United States v. Rossoff, 806 F. Supp. 200, 201–02 (C.D. Ill. 1992).

that the defendant had "been under great physical and emotional strain as the result of these repeated trials" and that the government "should not be given continued bites at the apple."[46] Finally, in *United States v. Wright*, the Western District Court of Pennsylvania was tasked with deciding whether to allow the government to try a defendant a third time after two hung jury retrials.[47] After an analysis of both *Ingram* and *Rossoff*, the court concluded it had "the inherent authority . . . to dismiss an indictment following multiple mistrials" and dismissed the indictment with prejudice due to it violating "fundamental fairness."[48]

Despite these examples, cases in which a federal judge has invoked their inherent authority to stop retrials after a hung jury are exceedingly rare.[49] A recent Supreme Court ruling on district court judges' inherent authority will only make them rarer. In *Dietz v. Bouldin*, the Supreme Court clarified "certain limits" on a district court's inherent authority.[50] Justice Sonia Sotomayor listed two requirements for invoking inherent authority: first, it "must be a reasonable response to the problems and needs confronting the court's fair administration of justice"; and second, it "cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute."[51] These principles spell doom for the usage of inherent authority to dismiss indictments after a hung jury, as the Federal Rules of Criminal Procedure 31(b)(3) give the government the right to retry a defendant after a hung jury mistrial: "If the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts. *The*

[46] *Id.* at 203.

[47] United States v. Wright, No. 14-292, 2017 WL 1179006, at *1 (W.D. Pa. 2017), *rev'd and remanded*, 913 F.3d 364 (3d Cir. 2019).

[48] *Id.* at *2–4.

[49] The only other case I could find that involved a district court judge dismissing indictments with prejudice after a hung jury mistrial is excerpted in the Ninth Circuit case *United States v. Miller*, in which the district court judge dismissed remaining counts at a status conference, stating, "I don't think it is fair to retry those counts." 4 F.3d 792, 794 (9th Cir. 1993). It is noteworthy that one other district judge has dismissed an indictment *without* prejudice "to allow a cooling-off period and promote . . . fundamental fairness." United States v. Wqas Khan, No. 2:10-CR-0175, 2014 WL 1330681, at *3 (E.D. Cal. 2014).

[50] 579 U.S. 40, 45 (2016).

[51] *Id.* at 45.

government may retry any defendant on any count on which the jury could not agree."[52] Even if Rule 31(b)(3) is not considered an express limitation on a district court judge's power, the rule seems to give the government full authority to retry defendants with mistrials declared due to a hung jury, thus leading to a presumption against the use of inherent authority after a hung jury mistrial.

The Third Circuit's reversal of the previously mentioned *Wright* case illustrates how the current inherent authority doctrine is hostile to indictment dismissals after a hung jury.[53] The Third Circuit began its analysis by remarking that there is "nothing in the text [of Rule 31] that empowers a court to prohibit the Government from retrying a case."[54] It then went on to consider the *Dietz* principles, starting with the first requirement that inherent authority "must be a reasonable response to the problems and needs confronting the court's fair administration of justice."[55] On its face, this requirement appears to favor the use of inherent authority in post-hung jury retrials; *Arizona v. Washington* already described how a retrial can be immensely burdensome on the defendant to the point of "gross unfairness."[56] Yet the Third Circuit limited the first *Dietz* requirement to only allow the use of inherent authority if "the Government engaged in misconduct, the defendant was prejudiced, and no less severe remedy was available to address the prejudice."[57] It then *further* limited "prejudice" to "actions that place a defendant at a disadvantage in addressing the charges," stating that "there is no prejudice to a defendant

[52] FED. R. CRIM. P. 31(b)(3) (emphasis added). While the government has had the right to retry a defendant after a hung jury since the Federal Rules of Criminal Procedure were adopted, *see* 18 U.S.C. § 566 (1946), it does not appear that district courts had viewed the rule as a limitation on their inherent authority before *Dietz*. *See, e.g.*, *Wright*, 2017 WL 1179006, at *4 (W.D. Pa. 2017) ("[T]here is nothing in Rule 31(b)(3) that limits a court's inherent supervisory authority to dismiss an indictment in the interests of fundamental fairness.").

[53] *See* United States v. Wright, 913 F.3d 364, 375 (3d Cir. 2019).

[54] *Id.* at 370–71.

[55] *Id.* at 371.

[56] Arizona v. Washington, 434 U.S. 497, 503–04 (1978).

[57] *Wright*, 913 F.3d at 371.

simply because [the defendant] faces the anxiety . . . of undergoing a trial."[58] Writing off the burdens a defendant faces due to multiple retrials as inconsequential, the Third Circuit found the first *Dietz* requirement had not been met.[59]

The Third Circuit then moved onto the second *Dietz* requirement: the exercise of inherent authority "cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute."[60] Asserting that "the decision to try or retry a case is at the discretion of the prosecutor" and that there is an "absence of power of the district court to dismiss an indictment in Rule 31(b)," the Third Circuit concluded that not only was the inherent authority to dismiss indictments after a hung jury mistrial not statutorily supported, it was also directly limited by the Constitution's separation of powers.[61] Thus, the second *Dietz* requirement was also found to be unfulfilled.[62] Finding both *Dietz* requirements unsatisfied, the Third Circuit reversed the indictment dismissals and remanded.[63]

The Third Circuit is currently the only appellate court post-*Dietz* that has ruled on the use of inherent authority to dismiss indictments after a hung jury mistrial. The only other circuit that addressed this use of inherent authority prior to *Dietz* was the Ninth Circuit, and it too held that inherent authority could not be used to dismiss indictments.[64] It is unclear how a defendant facing multiple hung jury mistrials could overcome the *Dietz* test, especially under the Third Circuit's restrictive interpretation, which has already been adopted by district courts.[65]

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[58] *Id.* at 372.
[59] *Id.* at 373.
[60] *Id.* at 371 (quoting Dietz v. Bouldin, 579 U.S. 40, 45 (2016)).
[61] *Id.* at 373–74.
[62] *Id.* at 375.
[63] *Id.*
[64] United States v. Miller, 4 F.3d 792, 796 (9th Cir. 1993) ("We conclude that the fact that the jury was hung by a six to six vote, or by one even more favorable to the defendant, is not an adequate basis for dismissal under the court's supervisory power.").
[65] Since *Dietz*, two district courts have already refused to invoke inherent authority after two hung jury mistrials, citing the Third Circuit in *Wright*. United States v. Harvey, No. 2:16CR109, 2022 WL 1224313, at *2 (N.D. Ind.

Considering the sparse number of cases supporting the use of inherent authority to stop retrials, the currently unfavorable Supreme Court inherent authority doctrine, and the circuit courts' unwillingness to prohibit retrials, it seems unlikely that the inherent authority of district courts can provide relief to defendants facing retrials after a hung jury.

The alternatives discussed above each have their pitfalls. Reinterpreting the Double Jeopardy Clause doctrine to make hung juries implicate double jeopardy would require the Supreme Court not only to overturn two centuries of precedent, but would also lead to the government's and public's interests being wholly ignored. And, while the inherent authority doctrine does allow judges to consider the defendant's and public's interests on an individual case-by-case level, its already sparse usage on hung jury mistrials has been further diminished by current Supreme Court and appellate circuit precedent. A solution that can provide relief to defendants suffering from the burdens of multiple hung jury retrials will need to avoid being stunted by contrary precedent and address the competing interests involved in deciding to retry a defendant. Enter: Rule 29.

II. Rule 29

Part II introduces Rule 29 as a potential solution to prevent undue retrials after a hung jury. First, it explains the mechanics of the rule based on its plain text. Second, it analyzes how the rule is currently applied by courts today.

A. The Plain Text

Rule 29 of the Federal Rules of Criminal Procedure is "Motion for a Judgment of Acquittal."[66] It has three relevant parts for hung juries: 29(a)–(c).[67] 29(a) allows the defendant to

2022) ("[N]o federal appeals court has approved such an exercise by a district court, and two have held in the contrary."); United States v. Martinez, No. 15-00031, 2019 WL 943377, at *3 (D. Guam 2019) ("Applying the *Wright* standard to the present case reveals that dismissal with prejudice is not warranted.").

[66] FED. R. CRIM. P. 29. The relevant parts of Rule 29 to hung juries are as follows:

move for acquittal after the government closes its evidence or after the close of all the evidence.[68] 29(c) allows an acquittal motion to be made before or after a jury discharge;[69] and 29(b) allows a district court judge to delay ruling on an acquittal motion until after the jury is discharged even if the motion was made before the discharge.[70] The rule provides a strict standard for how the judge should rule on a Rule 29 motion: "the court . . . *must* enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction."[71] Thus,

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(a) BEFORE SUBMISSION TO THE JURY. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) RESERVING DECISION. The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) AFTER JURY VERDICT OR DISCHARGE.
(1) *Time for a Motion.* A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later.
(2) *Ruling on the Motion.* If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.
(3) *No Prior Motion Required.* A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.
FED. R. CRIM. P. 29(a)–(c).

[67] Rule 29(d), "Conditional Ruling on a Motion for a New Trial," is only relevant when the judge acquits the defendant after a guilty verdict and is thus not applicable to hung jury mistrials. *See* FED. R. CRIM. P. 29(d).

[68] FED. R. CRIM. P. 29(a).

[69] FED. R. CRIM. P. 29(c)(1)–(3).

[70] FED. R. CRIM. P. 29(b). In ruling on a Rule 29 motion, the evidence a judge can consider differs based on whether the motion was made after the government closed its evidence or after the close of all the evidence. A ruling on a Rule 29 motion made after the government closes its evidence may only consider the evidence the government proffered, while a ruling made after the close of *all* the evidence may consider any evidence presented in the case. FED. R. CRIM. P. 29 advisory committee's notes to 1994 amendment. This difference remains true even if the judge reserves ruling on the motion pursuant to Rule 29(b). FED. R. CRIM. P. 29(b) ("If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved."). Thus, a judge reserving ruling on a Rule 29 motion made at the close of the government's evidence may only consider the government's proffered evidence even if the ruling is made after further evidence was provided by the defendant. *Id.* The purpose of this restriction is to prevent the judge's reservation of the motion from inadvertently pressuring the defendant to not present more evidence in fear of accidentally bolstering the government's case. FED. R. CRIM. P. 29 advisory committee's notes to 1994 amendment.

[71] FED. R. CRIM. P. 29(a) (emphasis added).

if a district court judge finds insufficient evidence to sustain a conviction, the judge has no choice but to acquit.

On its face, this standard appears to give relief to defendants facing retrial after a hung jury mistrial. A hung jury could be seen as indicative that the evidence was insufficient to sustain a conviction as the evidence had already failed to convince all of the members of a jury that conviction was warranted. Yet this is not how the insufficient evidence standard has been applied.

B. The Current Insufficient Evidence Standard

Rule 29 gives a judge no guidance in determining whether there is insufficient evidence to sustain a conviction.[72] Thus, the standard is a judicial creation first articulated in *Jackson v. Virginia*.[73] Justice Potter Stewart stated that to determine whether evidence is insufficient, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[74] What once looked like a favorable standard for defendants facing retrial post-hung jury was given a pro-prosecutor facelift, tilting the balance of evidence in "the light most favorable" for the government. As if that was not difficult enough to overcome, federal courts have also unanimously decided to apply the same standard regardless of the jury's verdict (or lack thereof).[75] Meaning a hung jury has no bearing on the standard whatsoever.[76]

[72] 26 MOORE, *supra* note 13, § 629.05. Rule 29 itself is a rule shrouded in mystery, as neither contemporaneous records nor advisory notes by the drafters give any rationale for why the rule was adopted. Richard Sauber & Michael Waldman, *Unlimited Power: Rule 29(a) and the Unreviewability of Directed Judgments of Acquittal*, 44 AM. U. L. REV. 433, 440 (1994).

[73] 443 U.S. 307, 319 (1979).

[74] *Id.* at 319 (emphasis in original). Federal district courts have universally adopted this standard. 26 MOORE, *supra* note 13, § 629.05.

[75] 26 MOORE, *supra* note 13, § 629.05.

[76] *See* United States v. Nimapoo, No. 1:05-CR-0316-13, 2008 WL 11384038, at *1 (N.D. Ga. 2008) (collecting cases all stating the standard of insufficient evidence does not change whether the trial court is ruling on the motion before or after a hung jury).

Thus, even if the entire jury fails to agree on whether the evidence sufficient to convict, the court is not allowed to view that failure to convict as indicative of insufficient evidence.

The *Jackson* standard is particularly harmful when applied to cases that result in hung juries, as it creates an unbridgeable mismatch between how the jury and judge analyze the evidence. A jury can only convict a defendant if *each and every* juror finds the defendant guilty beyond a reasonable doubt.[77] Yet the *Jackson* standard emphasizes that a judge must deem the evidence sufficient to convict if "*any* rational trier of fact" could find the defendant guilty beyond a reasonable doubt when viewing the evidence in the "light most favorable" to the government.[78] The gulf between how *any* rational trier of fact would view the evidence when forced to look at it in government-biased light and how a jury of *twelve* rational triers of fact actually views the evidence in an unbiased light can be enormous. This creates a hole in the Rule 29 acquittal process when applied to hung jury cases, as evidence in the "light most favorable" to the government may appear sufficient for any single juror to convict, but in reality is too weak to convince any group of twelve jurors to ever convict, theoretically allowing endless hung jury retrials.[79] Since the *Jackson* standard does not change no matter how many times a jury hangs, defendants trapped in this legal hole of endless retrials have no means to dig themselves out.

United States v. Penn, subject of the Note's introduction, exemplifies how insuperable the current insufficient evidence standard really is—even after multiple hung juries. As stated previously, the first two trials of broiler chicken industry executives accused of price fixing resulted in hung juries.[80] Recall that when the government stated they were going to try to the

[77] *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020).
[78] *Jackson*, 443 U.S. at 319 (emphasis in original).
[79] *See* Leonetti, *supra* note 29, at 87–88 ("In these situations . . . a mid-trial motion for judgment of acquittal[] could not dispose of the case—the evidence is legally sufficient—and the Double Jeopardy Clause does not generally prohibit a retrial so long as the previous mistrial was declared for manifest necessity, a standard that almost any 'hung jury' case will meet.").
[80] United States v. Penn, No. 20-cr-00152, 2022 WL 1773812, at *1 (D. Colo. June 1, 2022).

defendants a third time, presiding Judge Brimmer was not shy in expressing skepticism: "We know that the evidence could not persuade 12 people . . . . We've seen it happen twice."[81] This could be viewed as indicating that there was insufficient evidence to convict, as a federal conviction requires a *unanimous verdict*[82] of a *twelve-person jury*.[83]

Yet when it came to applying Rule 29's insufficient evidence standard, these concerns about the hung juries not-so-mysteriously vanished. Judge Brimmer started his Rule 29 analysis with the standard every district court applies: "viewing the evidence in the light most favorable to the government, a reasonable jury could have found the defendant guilty beyond a reasonable doubt."[84] He then went through the charges against the defendants, never mentioning the past two hung juries when considering whether the evidence was sufficient.[85] Viewing the evidence in the light most favorable to the government, Judge Brimmer found sufficient evidence for all the charges.[86]

Why was this result preordained? *Because the judge had already concluded the evidence was sufficient four months prior*.[87] The defendants had previously moved for a Rule 29 acquittal when the first trial resulted in a hung jury, and Judge Brimmer, undertaking the same analysis he would later conduct in response to the second motion, found sufficient evidence.[88] The current standard, which forces the judge not to consider past hung juries as indicative of insufficient evidence, essentially forced Judge Brimmer to repeat the same analysis on the same evidence.[89]

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[81] Henderson, *supra* note 4.
[82] FED. R. CRIM. P. 31(a).
[83] FED. R. CRIM. P. 23(b)(1).
[84] *Penn*, 2022 WL 1773812, at *2.
[85] *Id.* at *5–8.
[86] *Id.* at *9.
[87] United States v. Penn, No. 20-cr-00152, 2022 WL 124755, at *13 (D. Colo. Jan. 13, 2022).
[88] *Id.* at *1, *13.
[89] This is not to say the opinions were identical to each other; the second trial certainly led to different emphasis on evidence, which in turn led to slightly different opinions. However, the opinions are also eerily similar, reusing much of the same wording with minor alterations. *Compare Penn*, 2022 WL 124755, at *3 (D. Colo. Jan. 13, 2022)

It was a meaningless exercise; it is absurd to think that the government would somehow produce *less* sufficient evidence in a retrial they had *more* time to prepare for, especially when their evidence was already deemed sufficient in the first trial. A Rule 29 standard that forces judges to ignore hung juries as indicative of insufficient evidence and nonsensically conduct the same analysis over and over again every time a jury hangs is not a functional insufficient evidence standard.

III. A New Rule 29 Standard

This Note argues for a new Rule 29 standard that allows judges to consider a hung jury as indicative of the government's inability to provide sufficient evidence to sustain a conviction. The proposed revision to the standard is simple: after a jury fails to convict, the district judge should use the same *Jackson* standard for determining sufficiency of the evidence *except* the judge will no longer be required to view the government's evidence in "the light most favorable." Thus, the only inquiry the judge will be making in determining the sufficiency of the evidence after a hung jury is whether "a reasonable jury could have found the defendant guilty beyond a reasonable doubt."

The main benefit of this new standard is it allows the judge to consider all the evidence it has at its disposal when determining whether the evidence was insufficient to convict.[90] First, the judge can consider a hung jury as probative evidence that a reasonable jury could not have found

("The testimony of government witness *Robbie* Bryant, a Pilgrim's Pride ('Pilgrim's') employee, is sufficient to support a finding beyond a reasonable doubt that a conspiracy existed between [the defendants] to rig bids and fix prices.") (emphasis added), *with Penn*, 2022 WL 1773812, at *4 (D. Colo. June 1, 2022) ("The testimony of government witness *Robert* Bryant, a Pilgrim's Pride ('Pilgrim's') employee, is sufficient to support a finding beyond a reasonable doubt that a conspiracy existed between [the defendants] to rig bids and fix prices.") (emphasis added).

[90] Recall, however, that Rule 29 requires a judge to only review the evidence presented when the motion was made. FED. R. CRIM. P. 29(b); *supra* note 70. This prohibition would prevent a judge from considering a hung jury as indicative of insufficient evidence if the motion was made before the jury was discharged. *See* FED. R. CRIM. P. 29(b). Yet this restriction poses a nonexistent problem in practice; a defendant can avoid the restriction by simply making a new Rule 29 motion after the jury is discharged. FED. R. CRIM. P. 29(c)(3) ("A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.").

the defendant guilty.[91] This is not to say the judge is forced to consider the hung jury as definitive proof of insufficient evidence. If the judge has reason to believe the jury was not reasonable, the judge has full discretion to consider the hung jury inconclusive and give greater weight to other evidence. Yet even in this scenario where the judge disregards the hung jury entirely, the new standard at least allows the judge to make that determination, rather than forcing the judge to turn a blind eye to the possible suggestion of insufficient evidence that a hung jury provides.

Second, in not requiring the judge to only view the evidence in the "light most favorable" to the government, the new standard allows the judge to balance the parties' interests when deciding Rule 29 acquittals. In determining whether "a reasonable jury could have found the defendant guilty beyond a reasonable doubt," the judge could balance the chance a new jury will find the defendant guilty along with the government's interest in a retrial and the burden a retrial

[91] A judge under this proposed new Rule 29 standard could also consider the numerical split of the hung jurors when deciding whether to acquit a defendant, though the process to do so is a bit complicated. A judge may not inquire into the jurors' division on the merits of the case before a verdict is rendered, as the inquiry is seen as overly coercive on the jury. Brasfield v. United States, 272 U.S. 448, 449–50 (1926) ("[T]his court condemned the practice of inquiring of a jury, unable to agree, the extent of its numerical division . . . . We deem it essential to the fair and impartial conduct of the trial that the inquiry itself should be regarded as ground for reversal."). However, Judges can get around this prohibition in two ways. First, while a judge cannot ask the jury about the merits of the case, a judge *can* inquire into whether individual jurors believe further deliberations will resolve the jury's inability to come to a verdict. Lowenfield v. Phelps, 484 U.S. 231, 239 (1988) (holding that *Brasfield*'s prohibition on inquiries into jury division does not apply to "inquir[ies] as to the numerical division of the jury . . . on the question of whether further deliberations might assist them in returning a verdict"). While this approach gives judges a sense of how deadlocked the jury is, its usefulness is limited by the fact that the inquiry says nothing about how split the jury is on the merits (e.g., jurors facing an 11–1 split may still all respond to a *Lowenfield* inquiry by saying that more deliberation will not help if the one holdout juror is clearly unwilling to change their mind). Second, a judge may allow the parties' counsel to interview the jurors after a hung jury mistrial is declared. Edd Peyton & Escarlet Escobar, *What Do Jurors Think? Using Post-Trial Jury Interviews to Find What is Important in Trial*, ABA (Aug. 23, 2018), https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2018/what-do-jurors-think-using-post-trial-jury-interviews-to-find-what-is-important-in-trial/. Counsel can then interview the jurors about the merits and report their findings to the judge through briefs before a retrial occurs. *See, e.g.*, United States v. Wright, 913 F.3d 364, 378 n.3 (3d Cir. 2019) ("The Government asserted that in the first trial, jurors voted 7–5 for acquittal, and in the second trial, voted 8–4 for conviction. . . . [T]he Government said it obtained [these numbers] by speaking with the jurors."). Still, since the judge must rely on counsel to obtain this information, it is prone to being unreliable. *See, e.g.*, United States v. Wright, No. 14-292, 2017 WL 1179006, at *5 (W.D. Pa. 2017), ("[A]lthough the parties have made representations regarding the breakdown of jury votes in the two trials in this case, the Court will not rely on those representations in its analysis. The Court finds that counsels' post-trial discussions with jurors are unreliable, as evidenced by the disagreement between counsel in this case regarding the final jury counts.").

has on the defendant. This balancing takes into account the interests of the public and the defendant when deciding whether to acquit, interests that are not given appropriate weight under the current Rule 29 insufficient evidence standard.

While a significant shift on paper, this balancing already seems to be happening behind the scenes. Once more, *Penn* is illustrative. Before conducting the third trial, Judge Brimmer summoned Assistant Attorney General (AAG) Johnathan Kanter, head of the Department of Justice's (DOJ) Antitrust Division, to have him explain to the court why the government thought they could still win convictions after two hung juries.[92] A clearly annoyed Judge Brimmer emphasized how burdensome a third trial would be:

> If the government thinks that the 10 defendants and their attorneys and my staff and another group of jurors should spend six weeks retrying this case after the government has failed in two attempts to convict even one defendant, then certainly Mr. Kanter has the time to come to Denver and explain to me why the Department of Justice thinks that that is an appropriate thing to do.[93]

The government, not wanting to annoy the judge any further, subsequently dropped charges on five of the ten original defendants.[94] This simplification of the case likely increased the probability of a conviction and likely made Judge Brimmer more comfortable proceeding with the case.

Of course, much of this is speculation. None of these comments or weighing of the burdens and benefits of a retrial made it into Judge Brimmer's Rule 29 ruling, as the standard prohibits any such weighing of evidence that would not be in the "light most favorable" to the government. Yet, despite the standard prohibiting such balancing, it's hard to imagine that these concerns did not factor into Judge Brimmer's analysis, and it's interesting to wonder whether he would have miraculously shifted his perspective on the sufficiency of the evidence had Kanter

[92] Henderson, *supra* note 4.
[93] Henderson, *supra* note 1.
[94] Henderson, *supra* note 4.

refused to meet with him or if five of the ten defendants were not dropped from the case. But whether or not these DOJ concessions played a part in Judge Brimmer's ruling, it is clear that the current insufficient evidence standard does not allow a judge to overtly balance the benefits and burdens of a retrial. The proposed new Rule 29 standard avoids this smoke-and-mirrors act and allows a judge to explore all the evidence openly when deciding whether it is sufficient to go to a retrial after a hung jury.

IV. Application to States

While this Note has focused on federal courts, the proposed new Rule 29 standard could apply to state courts as well. Currently, at least twenty-eight states[95] explicitly allow a judge to acquit a defendant after a hung jury mistrial.[96] All twenty-eight of these states use an insufficient

[95] ALA. R. CRIM. P. 20.3(b)(1); ALASKA R. CRIM. P. 29(b); COLO. R. CRIM. P. 29(c); CONN. SUPER. CT. R. § 42-50; DEL. SUPER. CT. CRIM. R. P. 29(c); FLA. R. CRIM. P. 3.380(c); HAW. R. PENAL P. 29(c); IDAHO CRIM. R. 29(c)(1)–(2); IND. R. TRIAL P. 50(A)(6), (B); IOWA R. CRIM. P. 2.19(8)(b); KAN. STAT. ANN. § 22-3419(3); KY. R. CRIM. P. 10.24; ME. R. CRIM. P. 29(b); MASS. R. CRIM. P. 25(b)(1); MINN. CT. R. 26.03 Subd. 18(3)(a), (d); MO. SUP. CT. R. 27.07(c); N.J. CT. R. 3:18-2; N.Y. CRIM. PROC. LAW § 290.10(1); N.C. GEN. STAT. § 15A-1227(a)(4); N.D. R. CRIM. P. 29(c)(1); OHIO R. CRIM. P. 29(C); PA. R. CRIM. P. 606(A)(3); R.I. SUPER. CT. R. CRIM. P. 29(a)(2) (allowing motions for judgment of acquittal only before submission to jury, but also allowing ruling on those motions to be reserved and decided after jury discharge); TENN. R. CRIM. P. 29(e)(1); VT. R. CRIM. P. 29(c); VA. R. SUP. CT. 3A:15(a); W. VA. R. CRIM. P. 29(c); WYO. R. CRIM. P. 29(c).

For an analysis and compilation of the various motion for judgment of acquittal procedures used by states with a focus on *pre-verdict* judgments of acquittal, see generally MARIE LEARY & LAURAL L. HOOPER, FEDERAL JUDICIAL CENTER, STATE COURT PROCEDURES REGARDING PRE-VERDICT JUDGMENTS OF ACQUITTAL AND THE STATE'S RIGHT TO APPEAL THOSE JUDGMENTS, 27–44 (2003) (compiling states' motion for judgment of acquittal statutes). Be wary that some of the statutes have been amended since the report's publication.

[96] There is great variety in states that do not allow motions for judgment of acquittal after a hung jury mistrial. Louisiana does not allow motions for judgment of acquittal in jury trials at all. LA. CODE CRIM. PROC. ART. 778. Oklahoma does not allow motions for judgment of acquittal in jury trials but does allow the judge to advise the jury to acquit after the close of evidence on either side. OKLA. STAT. TIT. 22, § 22-850. Nevada only allows motions for judgment of acquittal after a guilty verdict. NEV. REV. STAT. § 175.381; Arkansas, California, Georgia, Illinois, Maryland, Mississippi, Montana, Oregon, South Carolina, South Dakota, Texas, and Utah allow motions for acquittal at the close of evidence on either side but before the case is submitted to the jury. ARK. R. CRIM. P. 33.1; CAL. PEN. CODE § 1118.1; GA. CODE § 17-9-1; 725 ILL. COMP. STAT. § 5/115-4(k); MD. CODE CRIM. P. § 6-104(a)(1), (b)(1); MISS. R. CRIM. P. 21(a), (b); MONT. CODE ANN. § 46-16-403; OR. REV. STAT. § 136.445; S.C. CRIM. R. 143(a); S.D. CODIFIED L. § 23A-23-1; TEX. CODE CRIM. PROC. ART. 45.032; UTAH R. CRIM. P. 17(o). Arizona, Michigan, Nebraska, New Hampshire, New Mexico, Washington, and Wisconsin allow motions for judgment of acquittal after the close of evidence on either side or after a verdict. ARIZ. R. CRIM. P. 20(a), (b); MICH. CT. R. 6.419(A), (C); State v. Combs, 900 N.W.2d 473, 480–81 (Neb. 2017); State v. Spinale, 937 A.2d 938, 945 (N.H. 2007); State v. Martinez, 503 P.3d 313, 317 (N.M. 2021); State v. Beckwith, No. 74962-1-I, 2018 WL 2203297, *2 (Wash. Ct. App. 2018); WIS. STAT. § 805.14(3), (4), (5). The use of the term "verdict" in these immediately preceding statutes, rules, and cases implicitly prohibits a judge from unilaterally acquitting a defendant after a hung jury mistrial due to a hung jury not being a verdict. *Hung jury*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see, e.g.*,

evidence standard that is identical, or functionally equivalent to, the standard in Rule 29.[97] And courts in all these states apply the *Jackson* "light most favorable" to the government standard,[98] meaning the new proposed Rule 29 standard could greatly benefit defendants in these states.

State v. Combs, 900 N.W.2d 473, 481 (Neb. 2017); ("Because a motion for judgment of acquittal is a motion for a directed *verdict* [in Nebraska], such a motion logically cannot be made after a trial has ended in a mistrial." (emphasis added)); State v. Breest, 155 A.3d 541, 550 (N.H. 2017) ("[A] hung jury cannot be considered a verdict."); *cf.* FED. R. CRIM. P. 29(c)(1) (distinguishing a verdict and jury discharge after a hung jury mistrial by stating "[a] defendant may move for a judgment of acquittal . . . after a guilty *verdict or after the court discharges the jury*" (emphasis added)).

Still, as stated later in Part V, acquittals are unappealable. *See* Evans v. Michigan, 568 U.S. 313, 329 (2013). Could judges in these states that do not allow motions for judgment of acquittal after a hung jury mistrial ignore legal procedures and acquit anyway? The Supreme Court in *Evans v. Michigan* seemed to imply that no legal error is large enough to make an acquittal appealable: "If the concern is that there is no limit to the magnitude of the error that could yield an acquittal, the response is that we have long held as much." 568 U.S., at 325. Taken to its extreme, the holding could be read as meaning that even statutorily invalid acquittals cannot be appealed. At least one state court has applied this interpretation and denied review of a procedurally dubious acquittal, though the part of the opinion doing so went unpublished. *See, e.g.*, State v. Gearhard, No. 36046-6-III, at ¶ 25–33 (Wash. Ct. App. 2020) (holding that while ruling on a directed verdict after a hung jury mistrial may be impermissible under Washington law, the state still cannot appeal the acquittal as it would violate the Supreme Court's jurisprudence on the Double Jeopardy Clause). While one could read the current Double Jeopardy Clause doctrine as allowing a judge to ignore procedural limits on their acquittal power, interpreting *Evans* this way is likely an overstatement, as the Court implies that a state could eliminate faulty acquittals by procedurally limiting when acquittals can be made. 568 U.S. at 329 ("Nothing obligates a jurisdiction to afford its trial courts the power to grant a midtrial acquittal, and at least two States disallow the practice.").

[97] ALA. R. CRIM. P. 20.3 committee comments; ALASKA R. CRIM. P. 29(a); COLO. R. CRIM. P. 29(a); CONN. SUPER. CT. R. § 42-50; DEL. SUPER. CT. CRIM. R. P. 29(a); FLA. R. CRIM. P. 3.380(a); HAW. R. PENAL P. 29(a); IDAHO CRIM. R. 29(a); IND. R. CIV. P. 50(A); IOWA R. CRIM. P. 2.19(8)(a); KAN. STAT. § 22-3419(1); KY. R. CRIM. P. 10.24; ME. R. CRIM. P. 29(a); MASS. R. CRIM. P. 25(a); MINN. CT. R. 26.03 Subd. 18(1)(a); MO. SUP. CT. R. 27.07(a); N.J. CT. R. 3:18-1; N.Y. CRIM. PRO. § 290.10(1); N.C. GEN. STAT. ANN. § 15A-1227(a); N.D. R. CRIM. P. 29(a); OHIO R. CRIM. P. 29(A); PA. R. CRIM. P. 606(A); R.I. SUPER. CT. R. CRIM. P. 29(a)(1); TENN. R. CRIM. P. 29(b); VT. R. CRIM. P. 29(a); VA. R. SUP. CT. 3A:15(a); W. VA. R. CRIM. P. 29(a); WYO. R. CRIM. P. 29(a).

[98] *See, e.g.*, *Ex parte* Burton, 783 So. 2d 887, 891 (Ala. 2000); Hentzer v. State, 613 P.2d 821, 823 (Alaska 1980); McCoy v. People, 442 P.3d 379, 392 (Colo. 2019); State v. Perkins, 856 A.2d 917, 938 (Conn. 2004); Cline v. State, 720 A.2d 891, 892 (Del. 1998); Sievers v. State, 355 So. 3d 871, 883 (Fla. 2022); State v. Hicks, 148 P.3d 493, 502 (Haw. 2006); State v. Goggin, 333 P.3d 112, 116 (Idaho 2014); State v. Williams, 695 N.W.2d 23, 28 (Iowa 2005); State v. Dihn Loc Ta, 290 P.3d 652, 657 (Kan. 2012); Commonwealth v. Sawhill, 660 S.W.2d, 3, 4 (Ky. 1983); State v. Stinson, 751 A.2d 1011, 1013 (Me. 2000); Commonwealth v. Chhim, 851 N.E.2d 422, 429 (Mass. 2006); State v. Slaughter, 691 N.W.2d 70, 75 (Minn. 2005); State v. Thompson, 147 S.W.3d 150, 154 (Mo. Ct. App. 2004); State v. Lodzinski, 265 A.3d 36, 52 (N.J. 2021); People v. Phillips, 256 A.D.2d 733, 735 (N.Y. 1998); State v. Shelly, 638 S.E.2d 516, 523 (N.C. Ct. App. 2007); State v. Hafner, 587 N.W.2d 177, 182 (N.D. 1998); State v. Spaulding, 89 N.E.3d 554, 585 (Ohio 2016); Commonwealth v. Widmer, 744 A.2d 745, 751 (Pa. 2000); State v. Valdez, 267 A.3d 638, 643 (R.I. 2022); State v. Collier, 411 S.W.3d 886, 893 (Tenn. 2013); State v. O'Keefe, 208 A.3d 249, 252 (Vt. 2019); Wagoner v. Commonwealth, 756 S.E.2d 165, 174 (Va. Ct. App. 2014); State v. Vilela, 792 S.E.2d 22, 32 (W. Va. 2016); Bean v. State, 373 P.3d 372, 386 (Wyo. 2016).

Despite this uniformity, states are under no constitutional obligation to apply the "light most favorable" standard. *Jackson* simply sets the constitutional minimum, allowing states to adopt more lenient standards. *See, e.g.*, Watson v. State, 204 S.W.3d 404, 412 (Tex. Crim. App. 2006) ("[W]hile *Jackson v. Virginia* does impose upon the states a constitutionally minimum legal sufficiency standard, it does not (and could not, consistent with principles of federalism) prevent the states from applying sufficiency standards that are more solicitous of defendants rights."). Texas, for example, at one point applied a two-part sufficiency-of-the-evidence test. For evidence to be sufficient to

For defendants left in the lurch of undue retrials post-hung jury, the impact of a new motion for judgment of acquittal standard could be even greater in state courts than in federal courts. The federal court system only has roughly 3,200 criminal trials per year, while the state court system has roughly 54,000 criminal trials.[99] State courts also have a hung jury rate of 6.2%, more than doubling the federal hung jury rate of 2.1%.[100] This means that a new Rule 29 standard for hung jury mistrials would have far more application in state courts than federal courts, increasing its overall impact. When applied to state courts as well as federal courts, this proposed new Rule 29 motion for judgment of acquittal standard could have an immense impact on defendants facing retrials after a hung jury.

Beyond the general statistics, application of the proposed new insufficient evidence standard in state courts would have an immense impact on *individual* defendants facing multiple hung jury retrials, as states seem to be much more willing to retry defendants over and over again.[101] The Curtis Flowers saga is a salient example.

Flowers was charged with capital murder in Mississippi.[102] His first trial resulted in a conviction and a death sentence, but was reversed and remanded by the Mississippi Supreme Court due to several instances of prosecutorial misconduct.[103] Throughout the trial, the

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convict, it had to not only be 1) legally sufficient under the *Jackson* "light most favorable" test, but also 2) factually sufficient, which involved the state court considering all the evidence neutrally to determine whether a guilty verdict would be "so against the great weight and preponderance of the evidence to be manifestly unjust." *See* Clewis v. State, 922 S.W.2d 136, 132–33 (Tex. Crim. App. 1996). Yet Texas later overruled itself, finding that it had been applying the factual sufficiency test so deferentially that it had become redundant to the *Jackson* legal sufficiency test. State v. Brooks, 323 S.W.3d 893, 900–02 (Tex. Crim. App. 2010).

[99] Ostrom et al., *supra* note 15, at 757.

[100] Hannaford-Agor et. al., *supra* note 35, at 25 (2002).

[101] Federal prosecutors are guided by the DOJ's "Justice Manual," which states that prosecution should commence only if "the admissible evidence will probably be sufficient to obtain and sustain a conviction." U.S. Dep't of Just., Just. Manual § 9-27.220 (2023). This has been interpreted as requiring the prosecutor to have a "good-faith belief they have at least a 50% chance of winning if they go to trial." Perlman & Koenig, *supra* note 8. Since multiple hung juries indicate a less than 50% chance of winning at trial, federal cases are rarely tried more than twice. *Id.* State prosecutors need not abide by these federal principles.

[102] Flowers v. State, 773 So.2d 309, 313 (Miss. 2000).

[103] *Id.* at 318–34.

prosecutor had impermissibly referenced crimes irrelevant to the case,[104] asked baseless impeaching questions during cross-examination,[105] and alluded to unadmitted evidence in their closing argument,[106] all of which cumulatively prejudiced Flowers's right to a fair trial.[107] His second trial also resulted in a conviction and a death sentence, but was again reversed due to the same prosecutorial misconduct as the first trial.[108] The prosecutor again impermissibly referenced other crimes irrelevant to the case,[109] again asked baseless impeaching questions during cross-examination,[110] and again alluded to unadmitted evidence in their closing argument.[111] Flowers's third trial again resulted in a conviction and a death sentence, and again was reversed and remanded due to prosecutorial misconduct; this time for using peremptory strikes in a racially discriminatory manner.[112] He was then tried a fourth time, resulting in a hung jury.[113] He was tried a fifth time; the jury hung *again*.[114] He was tried a *sixth* and final time, this one resulting in a conviction and a death sentence.[115]

Flowers appealed, arguing (among other things) that he should be acquitted based on insufficient evidence to convict.[116] Intuitively, one would think the procedural history above should matter, as it shows a string of prosecutorial abuse and jury indecision. The state had previously been given five chances to convict Flowers yet could only secure convictions through manipulating either the jury's perception of the evidence or the composition of the jury itself.

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[104] *Id.* at 318–25.
[105] *Id.* at 327–29.
[106] *Id.* at 329–30.
[107] *Id.* at 333–34.
[108] Flowers v. State, 842 So. 2d 531, 539–56 (Miss. 2003).
[109] *Id.* at 539–50.
[110] *Id.* at 551–53.
[111] *Id.* at 553–56.
[112] Flowers v. State, 947 So. 2d 910, 939 (Miss. 2007) (citing *Batson v. Kentucky*, 476 U.S. 79, 100 (1986)).
[113] Flowers v. State, 158 So. 3d 1009, 1023 (Miss. 2014).
[114] *Id.*
[115] *Id.* at 1022.
[116] Brief of Appellant at 8, Flowers v. State, 158 So. 3d 1009, 1039 (Miss. 2014) (No. 2010-DP-01348-SCT).

When these prosecutorial abuses stopped, so too did the convictions, as seen by the previous two hung juries. All of this indicates that the evidence was insufficient to convict.

Yet the Mississippi Supreme Court ignored it all. Like federal courts, Mississippi courts use the *Jackson* insufficient evidence standard, viewing all "evidence consistent with the defendant's guilt in the light most favorable to the State."[117] Thus, the Mississippi Supreme Court simply reviewed the prosecution's evidence and determined that, in the light most favorable to the prosecution, it could support Flowers's conviction.[118] There was no mention of past prosecutorial misconduct. There was no mention of the past two hung juries. All that mattered under the *Jackson* insufficient evidence standard was whether the state had provided evidence that, when viewed in isolated, biased light, could support the conviction. Under that surface-level analysis, Flowers's conviction and death sentence was upheld.

Or at least upheld for the moment. Flowers appealed to the U.S. Supreme Court, and the Court found that the prosecutor had once again impermissibly used peremptory strikes in a racially discriminatory manner.[119] The conviction was, for the fourth time in six trials, reversed and remanded.[120]

The prosecutor was given full discretion to retry the case again.[121] But rather than subject Flowers to a seventh trial, the state gave up. It dropped the charges, citing a lack of credible witnesses.[122] It took six trials, *twenty-three years*, for the state to admit it lacked sufficient evidence to convict. Flowers spent nearly all of those years in pretrial custody, awaiting

[117] Flowers v. State, 158 So. 3d 1009, 1039 (Miss. 2014).
[118] *Id.* at 1042.
[119] Flowers v. Mississippi, 139 S. Ct. 2228, 2251 (2019).
[120] *Id.*
[121] *Id.* at 2274 (Thomas, J., dissenting) ("The State is perfectly free to convict Curtis Flowers again.").
[122] Jason Slotkin, *After 6 Trials, Prosecutors Drop Charges Against Curtis Flowers*, NPR (Sept. 5, 2020, 5:01 PM), https://www.npr.org/2020/09/05/910061573/after-6-trials-prosecutors-drop-charges-against-curtis-flowers.

seemingly endless retrials.[123] Yet, despite the continuous prosecutorial misconduct and multiple hung juries, the decision to retry Flowers was never taken out of the prosecutor's hands. The *Jackson* "light most favorable" standard blinded judges from seeing anything outside the evidence the prosecutor presented, allowing a prosecutor who had been found *multiple times* to have engaged in misconduct and repeatedly failed to convince a full jury of Flowers's guilt to decide Flowers's fate.

The *Flowers* case is egregious, but not an anomaly. Professor Carrie Leonetti notes that multiple retrials of defendants after hung juries in state courts "happen[] relatively often" due to "the virtually unbridled charging discretion afforded prosecutors."[124] The current "light most favorable" insufficient evidence standard does nothing to check this unbridled prosecutorial discretion. Only an insufficient evidence standard that allows a judge to view the evidence in a normal light, weighing the benefits and burdens of a new trial, can counteract this prosecutorial abuse and provide relief to defendants.

V. Critiques and Rebuttals

Part V addresses two critiques of this new proposed Rule 29 insufficient evidence standard. First, it considers the counterargument that the proposal goes against past Supreme Court precedent regarding Rule 29. Second, it addresses the concern that because of this past precedent, district courts will lack the power to implement a new Rule 29 standard.

[123] *Id.* Flowers would later win a wrongful imprisonment suit against Mississippi, receiving the statutory maximum of $500,000. Parker Yesko, *Mississippi to Pay Curtis Flowers $500,000 for His Decades Behind Bars*, APM REPS. (Mar. 2, 2021), https://www.apmreports.org/story/2021/03/02/mississippi-to-pay-curtis-flowers-500000-settlement-for-decades-behind-bars.

[124] Leonetti, *supra* note 29, at 96–100 (giving two more "illustrative cases" in which defendants found themselves continuously retried after a hung jury).

A. Disregard for Precedent

One argument against my proposal is that it disregards longstanding precedent on how to determine whether evidence supporting a conviction is weak enough to warrant a Rule 29 acquittal. Yet a closer reading of cases where the insufficient evidence standard finds its origin shows that the current standard is not only inapplicable to hung juries, but also fails to abide by its purpose of preserving the jury's factfinding role.

The standard currently used comes from Justice Stewart's opinion in *Jackson v. Virginia*.[125] Yet Justice Stewart's reason for adopting the standard was based on preserving a jury's guilty verdict and is thus wholly inapplicable to the context of a hung jury mistrial. In explaining why a judge must view the government's evidence in the "light most favorable," Justice Stewart stated that "[o]nce a defendant *has been found guilty* of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution."[126] *Glasser v. United States*, the case cited by Justice Stewart as the originator of the "light most favorable" requirement, also emphasized the fact that the jury came to a verdict when explaining the standard: "The *verdict of a jury* must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it."[127]

A hung jury is not a verdict. Rather, it is the failure to come to a verdict.[128] This means there is no verdict to "preserve" or "sustain" that requires a court to use such a favorable standard for the government. If courts are truly supposed to preserve the factfinder's role as weigher of the evidence, then a jury's inability to come to a verdict should be respected. As the

[125] 443 U.S. 307, 319 (1979).
[126] *Id.* at 319 (citing Glasser v. United States, 315 U.S. 60, 80 (1942)) (first emphasis added).
[127] 315 U.S. at 80 (emphasis added).
[128] *Hung jury*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "hung jury" as "[a] jury that cannot reach a verdict by the required voting margin").

district court in *Ingram* concluded: "There is great deference shown jury determinations that result in conviction, and the same attitude should prevail when . . . members of a jury disagree so conclusively . . . ."[129] Yet the current standard, in forcing courts to look at the evidence in the "light most favorable" to the government, prevents the court from even acknowledging the jury's inability to reach a verdict. To preserve the jury's factfinding role as *Jackson* demands, the insufficient evidence standard must respect a jury's failure to come to a verdict by considering that failure in its insufficient evidence analysis, and only a standard that drops the "light most favorable" requirement will allow a judge to do so.

B. Reinterpreting Longstanding Precedent Does Not Work

Another counterargument is that the proposed reinterpretation of Rule 29 will not be accepted by appellate courts. The *Jackson* insufficient evidence standard is longstanding precedent used by every federal circuit and district court after a hung jury.[130] As seen in Part I's discussion about failed attempts to reinterpret the Double Jeopardy Clause's application to hung jury retrials, federal appellate courts are not fond of overturning longstanding precedent even if the original reasoning is faulty.[131] However, a new insufficient evidence standard does not implicate appellate courts whatsoever.

What makes revising the Rule 29 standard different from reinterpreting the Double Jeopardy Clause or inherent authority jurisprudence is that, unlike a post-conviction Rule 29 acquittal, a post-hung jury Rule 29 acquittal *cannot be reviewed by an appellate court*.[132] The

[129] United States v. Ingram, 412 F. Supp. 384, 385–86 (D.D.C. 1976).
[130] 26 MOORE, *supra* note 13, § 629.05.
[131] *See supra* Part I, Section B, Reinterpreting Precedent.
[132] 26 MOORE, *supra* note 13, § 629.20. ("[T]here still can be no appeal if the court enters judgment of acquittal when there has been no jury verdict . . . ."). A Rule 29 acquittal was at one point the "only district court ruling that is both absolutely dispositive and entirely unappealable." Sauber & Waldman, *supra* note 72, at 433. This was changed by the Criminal Appeals Act of 1994, which stated that an "order of a district court . . . judgment" could be appealed unless "the double jeopardy clause of the United States Constitution prohibits further prosecution." 18 U.S.C. § 3731. Rule 29 was subsequently amended to allow a judge to reserve ruling on a motion for acquittal until after a

Supreme Court in *United States v. Martin Linen Supply Co.* stated that any review of an acquittal after a hung jury would violate the Double Jeopardy Clause.[133] Furthermore, the Supreme Court has consistently held that this bar on retrial remains in force even if the acquittal was based on legal error.[134] Thus, the impenetrable Double Jeopardy Clause doctrine that previously spurned defendants facing hung jury retrials becomes a defendant's greatest weapon under the proposed new Rule 29 standard. If a district court judge acquits a defendant after a hung jury on a Rule 29 motion, appellate courts are powerless to change that acquittal *even if* they disagree with the insufficient evidence standard used.[135]

Conclusion

Legal scholars, judges, and defendants alike have all sought ways to prevent the government from unduly retrying defendants after a hung jury. They looked first to the Double Jeopardy Clause, but the small and cryptic *Perez* opinion that declared hung jury retrials to not implicate double jeopardy proved too far-reaching and durable to overcome. Then they looked to

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jury verdict. *See* FED. R. CRIM. P. 29(b). The Advisory Committee of the Federal Rules of Criminal Procedure determined that if the judge granted the motion for acquittal *after* a guilty jury verdict, that acquittal could be appealed without violating the Double Jeopardy Clause as there would be no need for another trial even if the acquittal was reversed. FED. R. CRIM. P. 29 advisory committee's notes to 1994 amendment. Still, the Advisory Committee was clear that this exception only applies to post-guilty-verdict acquittals, stating, "[T]he government's right to appeal a Rule 29 motion is only preserved where the ruling is reserved *until after the verdict*." *Id.* (emphasis added); *see also* 26 MOORE, *supra* note 13, § 629.20. ("[T]he United States can appeal if the court grants acquittal *subsequent* to a guilty verdict.").

[133] United States v. Martin Linen Supply Co., 430 U.S. 564, 576 (1977) ("[T]he Double Jeopardy Clause bars appeal from an acquittal when there has been no jury verdict . . . .").

[134] Sanabria v. United States, 437 U.S. 54, 78 (1978) ("The trial court's rulings here led to an erroneous resolution in the defendant's favor on the merits of the charge . . . . [T]he Double Jeopardy Clause absolutely bars a second trial in such circumstances."); Evans v. Michigan, 568 U.S. 313, 329 (2013) ("We therefore reiterate: 'any contention that the Double Jeopardy Clause must itself . . . leave open a way of correcting legal errors is at odds with the well-established rule that the bar will attach to a preverdict acquittal that is patently wrong in law.'") (quoting Smith v. Massachusetts, 543 U.S. 462, 473 (2005)).

[135] State legislatures and courts have tried various means to get around the unappealability of acquittals, such as giving defendants the option to challenge the sufficiency of the evidence but labelling them "motion for dismissal" instead and declaring that "dismissal" appealable. *See, e.g.*, N.C. GEN. STAT. ANN. § 15A-1227(a), (d). These attempts at procedural wordplay were unanimously rejected by the Supreme Court in *Smalis v. Pennsylvania*, which held that "a judgment that the evidence is legally insufficient to sustain a guilty verdict constitutes an acquittal for purposes of the Double Jeopardy Clause" no matter the label. 476 U.S. 140, 142, 144 n.5 (1986) ("[T]he Pennsylvania Supreme Court's characterization, as a matter of double jeopardy law, of an order granting a demurrer is not binding on us.").

judges' inherent authority to stop undue retrials, only to have the Supreme Court establish a strict test in *Dietz* that made using inherent authority to stop hung jury retrials all but impossible. Finally, they turned to Rule 29, but have been stopped by an insufficient evidence standard that gives no regard to hung juries and is heavily tilted in the government's favor.

There is no reason it has to be this way. Rule 29 gives no standard for how to determine the sufficiency of the evidence, the *Jackson* "light most favorable" to the government standard is not applicable to hung jury retrials, and the appellate courts' unwillingness to change this standard is no obstacle due to the unappealable nature of post-hung jury acquittals. Courts need not be at the mercy of the government when deciding whether to conduct a retrial after a hung jury.

We end where we began, with *Penn*. In his hearing with AAG Kanter, Judge Brimmer asked what stops the DOJ from continually trying defendants after a hung jury: "How many times does the department say we believe in our case as opposed to let's look at the evidence?"[136] Kanter responded that he believed "justice will be served" by having another trial.[137]

Though a nice sentiment, this Note contends that the "justice" of yet another trial should be the decision of an impartial judge, not the government. A new Rule 29 insufficient evidence standard that allows judges to review all the evidence in the light in which it was actually seen—while balancing the benefits and burdens a new trial—would truly ensure justice is served.

[136] Matthew Perlman, *DOJ Told to Think Over 3rd Chicken Price-Fixing Trial*, LAW360 (Apr. 15, 2022, 7:17 PM), https://www-law360-com.turing.library.northwestern.edu/articles/1484588?scroll=1&related=1.
[137] *Id.*

Applicant Details

First Name	**Darius**
Last Name	**Iraj**
Citizenship Status	**U. S. Citizen**
Email Address	**diraj@pennlaw.upenn.edu**
Address	**Address** Street **3601 Market Street Unit 2012** City **Philadelphia** State/Territory **Pennsylvania** Zip **19104**
Contact Phone Number	**5167129284**

Applicant Education

BA/BS From	**Georgetown University**
Date of BA/BS	**May 2019**
JD/LLB From	**University of Pennsylvania Carey Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**May 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Pennsylvania Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Lindell, Karen
lindellk@law.upenn.edu
215-898-8419
Struve, Catherine
cstruve@law.upenn.edu
215-898-7068
Baker, Tom
tombaker@law.upenn.edu
This applicant has certified that all data entered in this profile and any application documents are true and correct.

DARIUS J. IRAJ

3601 Market Street, Unit 2012 | Philadelphia, PA 19104
(516) 712-9284 | diraj@pennlaw.upenn.edu

June 17, 2023

The Honorable Michael B. Brennan
United States Court of Appeals
Seventh Circuit
United States Courthouse and Federal Building
517 East Wisconsin Avenue, Room 618
Milwaukee, WI 53202

Dear Judge Brennan:

I am writing to request your consideration of my application for your next available clerkship opening in 2024. I am a rising third-year law student at the University of Pennsylvania Carey Law School, and I seek a federal appellate clerkship prior to clerking for a district court. From August 2025 to 2026, I will clerk for Judge Mark Pittman of the United States District Court for the Northern District of Texas.

Because I would like to clerk for a judge who has had an affiliation with the Federalist Society, I have decided to apply to your chambers. I believe that the role of a judge is to apply the law as it is written and set aside his personal preferences. I also believe judges should apply the methods espoused by proponents of originalism and textualism in order to come to the correct legal conclusion. As the Vice President of the Penn Law Federalist Society, I have led efforts to educate myself and our chapter on these important judicial philosophies. I naturally still have much to learn. Given my goal of become a religious freedom lawyer, I believe that applying to your chambers would provide an extraordinary opportunity to move closer to that goal.

Through my prior experiences, I developed strong time management, writing, research, and analytical skills, which I am refining as a law student. Last summer, as a judicial extern, I continued to improve my legal research and writing skills with the help of extensive feedback from the law clerks and the Judge through my work on government contracts cases. Coursework in advanced civil procedure (taught by the Honorable Anthony J. Scirica of the United States Court of Appeals for the Third Circuit) and the development of my comment on religious liberty have taught me to research and write with attention to detail. I intend to further develop my skills in courses such as appellate advocacy, evidence, and criminal procedure.

I enclose my resume, transcript, and writing sample. Letters of recommendation from Professor Karen Lindell (lindellk@law.upenn.edu, 215-898-8419), Professor Catherine Struve (cstruve@law.upenn.edu, 215-898-7068), and Professor Tom Baker (tombaker@law.upenn.edu, 215-5898-7413) will also be sent to you directly from them. Please let me know if any other information would be useful. Thank you.

DARIUS J. IRAJ

3601 Market Street, Unit 2012 | Philadelphia, PA 19104
(516) 712-9284 | diraj@pennlaw.upenn.edu

Respectfully,

Darius J. Iraj

Encls.

DARIUS J. IRAJ

3601 Market Street, Unit 2012 | Philadelphia, PA 19104
(516) 712-9284 | diraj@pennlaw.upenn.edu

EDUCATION

University of Pennsylvania Carey Law School, Philadelphia, PA 2024
Juris Doctor Candidate
Honors: *University of Pennsylvania Law Review*, Senior Editor
Activities: *Harvard Journal of Law & Public Policy*, Symposium Issue
Penn Law Federalist Society, Vice President
Christian Legal Society, President
Penn Law for Philly, Executive Board Member
St. Thomas More Society, Founding Board Member
Blackstone Legal Fellowship, Class of 2022

Georgetown University, Washington, D.C. 2019
Bachelor of Arts, *cum laude*, Government
Honors: First Honors (two semesters), Second Honors (three semesters), Dean's List (one semester)
Activities: Iranian Cultural Society, Study Abroad at Humboldt University of Berlin (classes taught in German), Catholic Retreats Leader, SigEp (Communications Board), Sunday School Teacher

EXPERIENCE

United States District Court for the Northern District of Texas, Fort Worth, TX Beginning Summer 2025
Law Clerk to the Honorable Mark T. Pittman

Cadwalader, Wickersham & Taft LLP, Washington, D.C./New York, NY Summer 2023
Summer Associate

Americans United for Life, Washington, D.C. Spring 2023
Pro Bono Extern
Wrote an amicus brief disputing the United States Department of Health and Human Services' interpretation of the Emergency Medical Treatment and Active Labor Act.

United States Court of Federal Claims, Washington, D.C. Summer 2022
Judicial Extern to the Honorable Ryan T. Holte
Assisted Judge Holte and his law clerks with legal research and writing of a civil-only docket.

Fellowship of Catholic University Students (Boston University), Boston, MA May 2019–June 2021
Campus Minister
Organized weekly leadership training events to foster community and facilitate small group discussions. Delivered weekly presentations on the theology and practice of Catholicism. Led fundraising initiatives and service trips, while earning a certification in Professional Campus Ministry from the University of Mary.

The Hoya, Washington, D.C. September 2015–September 2018
Sports Editor, Staff Writer
Authored weekly campus news articles and edited previews, recaps, and feature stories biweekly. Managed production nights to facilitate the newspaper's publication.

INTERESTS

NBA basketball, mindfulness meditation, watching German shows and videos, Pints With Aquinas Podcast (Catholicism), The Lowe Post Podcast (Basketball), prayer, mentoring students at the Penn Catholic Center

Record of: Darius John Iraj
Penn ID: 49166808
Date of Birth: 20-DEC
Date Issued: 08-JUN-2023

U N O F F I C I A L Page: 1

The University of Pennsylvania

Level:Law

Primary Program
Program: Juris Doctor
Division : Law
Major : Law

SUBJ	NO.	COURSE TITLE	SH	GRD	R
INSTITUTION CREDIT:					
Fall 2021					
Law					
LAW	500	Civil Procedure (Fisch) - Sec 2	4.00	B+	
LAW	502	Contracts (Ruskola) - Sec 2B	4.00	B	
LAW	504	Torts (Baker) - Sec 2B	4.00	A-	
LAW	510	Legal Practice Skills (Lindell)	4.00	CR	
LAW	512	Legal Practice Skills Cohort (Rothermich)	0.00	CR	
Ehrs: 16.00					
Spring 2022					
Law					
LAW	501	Constitutional Law (Berman) - Sec 2	4.00	B+	
LAW	503	Criminal Law (Mayson) - Sec 2	4.00	B	
LAW	508	Property (Gordon)	3.00	A+	
LAW	510	Legal Practice Skills (Lindell)	2.00	CR	
LAW	512	Legal Practice Skills Cohort (Rothermich)	0.00	CR	
LAW	660	International Law (Burke-White)	3.00	A-	
Ehrs: 16.00					
Fall 2022					
Law					
********** CONTINUED ON NEXT COLUMN **********					

SUBJ	NO.	COURSE TITLE	SH	GRD	R
Institution Information continued:					
LAW	5780	Discovery Methods (Mishkin)	2.00	A	
LAW	6220	Corporations (Skeel)	4.00	A-	
LAW	6380	Federal Courts (Galbraith)	4.00	B+	
LAW	8020	Law Review - Associate Editor	1.00	CR	I
LAW	9750	Advanced Problems in Federal Procedure (Struve/Scirica)	3.00	A-	
Ehrs: 14.00					
Spring 2023					
Law					
LAW	5820	Advance Legal Research I (Tung)	1.00	A-	
LAW	6010	Administrative Law (Lee)	3.00	A-	
LAW	6930	Church and State (Barak-Corren)	2.00	A	
LAW	7230	Federal Indian Law (Struve)	3.00	A	
LAW	8020	Law Review - Associate Editor	0.00	CR	I
LAW	9990	Independent Study (Skeel)	3.00	A	
Ehrs: 12.00					

********** TRANSCRIPT TOTALS **********

	Earned Hrs
TOTAL INSTITUTION	58.00
TOTAL TRANSFER	0.00
OVERALL	58.00

********** END OF TRANSCRIPT **********

UNOFFICIAL

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Darius John Iraj
ID:: 826951331

Student Address:
Date of Birth: 20-Dec

Course Level: Undergraduate

High Schools Attended:
CHAMINADE HIGH SCHOOL
MINEOLA NY

Degrees Awarded:
Bachelor of Arts May 18, 2019
Georgetown College
Major: Government
Minor: German
Minor: Theology
Degree GPA: 3.767
Honors: Cum Laude

Entering Program:
Georgetown College
Bachelor of Arts
Major: Undeclared

Subj	Crs	Title	Crd	Grd	Pts	R
Fall 2015						
COSC	044	Linked: Exp Social & LIfe Sci	3.00	A-	11.01	
GERM	101	Adv Germ I:Stories & Histories	3.00	A-	11.01	
GOVT	060	International Relations	3.00	B+	9.99	
HIST	099	Hist Focus:Oil and World Power	3.00	A-	11.01	
WRIT	015	Writing and Culture Dean's List	3.00	A-	11.01	

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	54.03	3.602

Subj	Crs	Title	Crd	Grd	Pts	R
Spring 2016						
ENGL	151	Austen	3.00	A-	11.01	
GERM	102	Adv Germ II:Stories/ Histories	3.00	A-	11.01	
GOVT	080	Elements of Political Theory	3.00	B+	9.99	
SPAN	001	Beginning Spanish	3.00	B+	9.99	
THEO	011	Intro to Biblical Literature	3.00	B+	9.99	

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	51.99	3.466

Subj	Crs	Title	Crd	Grd	Pts	R
Fall 2016						
GERM	161	Issues/Trends	3.00	A	12.00	
GOVT	040	Comparative Political Systems	3.00	A	12.00	
JOUR	100	Introduction to Journalism	3.00	A-	11.01	
PHIL	020	Intro to Philosophy	3.00	A	12.00	
THEO	085	Catholic Soc Tht & Public Life Second Honors	3.00	A-	11.01	

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	58.02	3.868

----------Continued on Next Column----------

Program Changed to:
Major: Government

Subj	Crs	Title	Crd	Grd	Pts	R
Spring 2017						
GERM	152	Text in Context:Readng Germany	3.00	B+	9.99	
GOVT	264	Contemp US Foreign Policy	3.00	A	12.00	
HIST	161	Middle East II	3.00	A	12.00	
JOUR	200	Digital News	3.00	A	12.00	
THEO	051	Modern Hinduism Second Honors	3.00	A-	11.01	

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	57.00	3.800

Subj	Crs	Title	Crd	Grd	Pts	R
Fall 2017						
GU/HUMBOLT UNIV, BERLIN						
German Language in Context: Competent Abroad			4.00	A-		
From Lenin to Lola: Contemporary German Film			3.00	A		
Germany and European Unification			3.00	A		
Honors Seminar in International Relations: Berlin Behind the Scenes: Institutions in the Political Center of Germany			3.00	A		
German Popular Culture			3.00	A-		
School Total:			16.00			

	EHrs	QHrs	QPts	GPA
Current	0.00	0.00	0.00	0.000

Subj	Crs	Title	Crd	Grd	Pts	R
Spring 2018						
GERM	329	Superheroes in Germ. Lit&Cult.	3.00	A-	11.01	
GOVT	020	US Political Systems	3.00	A	12.00	
GOVT	375	DepSem:Transatlantic Relations	3.00	A	12.00	
PHIL	119	Friendship and the Good Life	3.00	A	12.00	
THEO	220	Prot & Cath Ethics First Honors	3.00	A	12.00	

	EHrs	QHrs	QPts	GPA
Current	15.00	15.00	59.01	3.934

Subj	Crs	Title	Crd	Grd	Pts	R
Fall 2018						
BIOL	013	Issues in Biology	3.00	A-	11.01	
GOVT	260	International Security	3.00	A-	11.01	
GOVT	281	Racial Liberalism,Law&Justice	3.00	A-	11.01	
THEO	001	The Problem of God	3.00	A	12.00	
THEO	022	Intro to Roman Catholic Theo	3.00	A	12.00	
THEO	301	Tutorial: Theology Can a Christian Lose his Salvation Second Honors	1.00	A	4.00	

	EHrs	QHrs	QPts	GPA
Current	16.00	16.00	61.03	3.814

----------Continued on Next Page----------

Unofficial

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Darius John Iraj
ID:: 826951331

Subj	Crs	Title	Crd	Grd	Pts	R
Spring 2019						
GOVT	201	Analysis of Political Data I	3.00	A-	11.01	
GOVT	261	International Political Econom	3.00	A	12.00	
THEO	033	Newman: the Catholic Way	3.00	A	12.00	
THEO	367	Two Councils: Trent/ Vatican II	3.00	A	12.00	
UNXD	400	Freud and the Good Life First Honors	1.00	S	0.00	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	13.00	12.00	47.01	3.917
Cumulative	120.00	103.00	388.09	3.767

End of Undergraduate Record

Unofficial

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 17, 2023

The Honorable Michael Brennan
United States Courthouse and Federal Building
517 East Wisconsin Avenue, Room 618
Milwaukee, WI 53202

Re: Clerkship Applicant Darius Iraj

Dear Judge Brennan:

I am writing to highly recommend Darius Iraj to serve as your law clerk. Darius is one of the most diligent and determined students I have taught, and I am confident he would be a strong addition to your chambers.

Darius has the legal skills needed to be an outstanding law clerk. I met Darius in the fall of 2021, when he was assigned to my year-long, first-year Legal Practice Skills class at the University of Pennsylvania Carey Law School. Even within a cohort of studious 1Ls, Darius stood out as exceptionally hard working, and the fruits of his labors have paid off – he is a highly capable legal writer and researcher. My class is a demanding one. In addition to drafting several memo assignments and a summary judgment brief, my students simulate meetings with supervisors and clients, negotiate a business deal and settlement agreement, and deliver an oral argument, among other activities. Darius approached each task utterly determined to master it. He was an active and thoughtful participant in class, and he engaged deeply both on the substance of the legal doctrines and on the practice skills that were the focus of the class. He was extraordinarily responsive to feedback; I give detailed written comments on each major writing assignment, and I learned early on that Darius would pore over each comment, making sure he understood it and coming to me for any needed clarification. As a result, his writing – which was strong from the outset – improved dramatically over the course of the year. Based on my own experience as a law clerk, I can say with confidence that Darius has the legal skill set needed to succeed in that role.

Since taking my class, Darius has continued to deepen his skills in legal writing, research, and analysis. He was awarded a position on the University of Pennsylvania Law Review, which has helped hone his editing and citation skills, and he interned with Judge Ryan T. Holte during his 1L summer, further developing his research and writing ability. He has also taken a challenging courseload designed to help him succeed in a judicial clerkship and future career in litigation, including taking both Federal Courts and Advanced Problems in Federal Procedure during the first semester of his 2L year. As has been true throughout his law school career, Darius leans in to challenges, striving to get the most that he can out of his time at Penn Carey Law.

Darius is also a leader among his peers, and he is animated by a passion for religious liberty. He is an active member of Penn Law's chapter of the Federalist Society, and he was just selected as the organization's vice president. He has also founded a chapter of the St. Thomas More Society at Penn Law, and he serves as president of the Christian Legal Society. Indeed, Darius's past work as a missionary inspired his decision to become a lawyer, and his faith fuels his drive to succeed as a law student and lawyer.

In short, Darius brings passion, tenacity, and a dogged work ethic to his tasks as a student, and I'm sure he would bring those same traits to the tasks of a law clerk. I hope you give him serious consideration for the position, and please let me know if you have any questions or would like any additional information.

Sincerely,

Karen U. Lindell
Senior Lecturer, Legal Practice Skills
lindellk@law.upenn.edu
215-898-8419

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 17, 2023

The Honorable Michael Brennan
United States Courthouse and Federal Building
517 East Wisconsin Avenue, Room 618
Milwaukee, WI 53202

Re: Clerkship Applicant Darius Iraj

Dear Judge Brennan:

I understand that Darius Iraj is applying for a clerkship in your chambers. Darius stands out by reason of his love of in-depth research – a quality that will make him a valued and diligent law clerk. His superior performance in my challenging doctrinal course (Federal Indian Law) shows an analytical strength that will serve him and his judge well. And he is a pleasure to supervise. I recommend him very highly.

Darius was an excellent class participant in the fall 2022 seminar on Advanced Problems in Federal Procedure that I co-taught with Judge Anthony Scirica. In that seminar, we consider how the challenges of complex litigation vary with its subject matter; we canvass different modes of resolution (such as the settlement class action and the bankruptcy proceeding); and we compare varying means of law reform (e.g., court decisions, rulemaking, and legislation). Each student makes a class presentation (accompanied by a brief response paper) concerning one or two of the course readings and writes a final research paper. Darius was a frequent and helpful contributor in our class discussions. Darius gave a lucid and insightful presentation on Geoffrey Hazard's 2000 article "The Futures Problem," which addressed the difficulties presented by potential future mass-tort claimants whose injuries have not yet manifested.

Darius independently identified a very good paper topic. His paper responded to the critique of associational standing leveled by the panel majority in Association of American Physicians & Surgeons v. United States Food & Drug Admin., 13 F.4th 531 (6th Cir. 2021) ("AAPS"). Darius first sketched the basics of Article III standing doctrine (including associational standing), and then summarized the AAPS panel majority's critique of Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977). Darius went on to offer his own alternative argument in support of associational standing, based in part on analogies to medieval group litigation. He also analyzed the preclusion implications of his argument, and he closed by arguing that the doctrine of stare decisis should lead the Court to retain Hunt's associational-standing doctrine. Darius formulated an excellent topic, and he did a very nice job of summarizing the AAPS panel majority's critique of associational standing. The arguments he deployed to rebut the majority's critique were broad-ranging and ambitious, and though ultimately they might not persuade all readers, I was very impressed by the diligence and creativity that he brought to the project. Based on his class participation, class presentation, and paper, we awarded him an A-minus for the course.

More recently, Darius excelled in my spring 2023 class on Federal Indian Law. That course is a rigorous doctrinal course that focuses on the historical and modern relationships among tribal, federal, and state governments. I used a panel system in that course to ensure that I called on each student multiple times during the semester. The times that Darius was on panel involved challenging material – namely, federal assertions of authority over Native nations; federal common law limits on tribal criminal jurisdiction; and the present-day contours of criminal jurisdiction in Indian country – and each time, Darius was well-prepared and answered my questions insightfully. On the final exam (which consisted of issue-spotting hypothetical questions on a broad range of topics) Darius's comprehensive and well-argued answers earned him a straight A for the course.

Darius earned his B.A. with honors in Government from Georgetown. As a staff writer and editor on the school's flagship paper, Darius gained experience writing concisely under deadlines. He spent a semester abroad in Berlin, immersing himself in the German language and pursuing his interest in international relations. Darius is half Persian (with grandparents who hale from Iran), and he devoted time to the Iranian Cultural Society at Georgetown. Darius's Christian faith deepened during college, and after graduating, he spent two years as a campus minister for the Fellowship of Catholic University Students (a Catholic campus outreach program). In that capacity Darius led Bible studies, shared his faith, received training in Catholic theology, and enjoyed debating theological questions with Protestant Christians.

Here at Penn Law, Darius joined the Penn Law Review, and in the coming year he will also work on the symposium issue for Harvard's Journal of Law and Public Policy. He continues to share his faith, serving as the incoming President of the Christian Legal Society and informally mentoring Catholic undergraduates.

Darius will be an asset to chambers. He is great to work with, and he will get along well with everyone in chambers. I recommend him very enthusiastically. Please do not hesitate to let me know if there is any other information that would be useful to you.

Sincerely,

Catherine T. Struve
David E. Kaufman & Leopold C. Glass
Professor of Law
(215) 898-7068

Catherine Struve - cstruve@law.upenn.edu - 215-898-7068

cstruve@law.upenn.edu

Catherine Struve - cstruve@law.upenn.edu - 215-898-7068

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 17, 2023

The Honorable Michael Brennan
United States Courthouse and Federal Building
517 East Wisconsin Avenue, Room 618
Milwaukee, WI 53202

Re: Clerkship Applicant Darius Iraj

Dear Judge Brennan:

I am writing in support of the application of Darius Iraj for a clerkship in your chambers. Darius was a student in my torts class during his first year. He consistently asked the most thoughtful and probing questions throughout the semester. Unlike many of his classmates, he wasn't afraid to seek clarification when he didn't understand or to push back when he disagreed. In short, he kept me on my toes, though always in a respectful and thoughtful manner.

Darius is an active, highly regarded member of our student body, with significant roles in our Federalist Society and Christian Legal Society. While we don't rank our students officially, his grades put him in the top quarter of the class, and I rank his leadership ability and likelihood of professional success even higher. Darius came to law school to develop his analytical and legal reasoning abilities so that he can serve as an effective advocate. Serving as a clerk in your chambers would take him to the next level. I strongly encourage you to give him that opportunity.

Very truly yours,

Tom Baker
William Maul Measey Professor of Law
Tel.: (215) 898-7413
E-mail: tombaker@law.upenn.edu

DARIUS J. IRAJ

3601 Market Street, Unit 2012 | Philadelphia, PA 19104
(516) 712-9284 | diraj@pennlaw.upenn.edu

Legal Writing Sample

The following writing sample is an excerpt from a brief I wrote in my Legal Practice Skills course that sought the denial of a motion for summary judgment. My client, the plaintiff in the suit, was a high school student who lost a college athletic scholarship because he purportedly violated the school's vaping policy. My client sued the school district, arguing that two searches of his personal cellphone by a school official, Jane Sylvester, violated his Fourth Amendment rights. His phone was initially searched pursuant to a school policy authorizing suspicionless searches, and then it was again searched after a school official saw a Venmo notification she deemed suspicious. The second search revealed evidence that my client was possibly selling vape pods on campus. My brief opposed the school district's motion for summary judgment on my client's claims. For the sake of brevity, this writing sample includes only my argument regarding the second search in the latter half of the brief.

DARIUS J. IRAJ
3601 Market Street, Unit 2012 | Philadelphia, PA 19104
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I. SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE THE QUANTITY AND QUALITY OF INFORMATION ACCESSED IN A CELL PHONE IS DISPROPORTIONATE TO THE URGENCY PRESENTED BY THE CIRCUMSTANCES OF THE SEARCH.

The second search should be held unconstitutional because a cell phone typically contains private information that an ordinary person would not feel comfortable sharing with the public at large, rendering the scope of the search unreasonable. This second search, as a search by a school official grounded in suspicion of wrongdoing, is governed by a two-part test established by the Supreme Court in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). First, the search must be "justified at inception." *Id.* at 341-42. Second, the search must be lawful in scope, which requires that the means taken to conduct the search are "reasonably related to the objectives of the search." *Id*. at 342. This test is designed to balance the needs of the school to protect its students and maintain order while also protecting the privacy interests of students where the school strays beyond what is necessary for it to achieve its objectives. *See id.* Here, the search was unreasonable both at inception and in its scope because Keshara, an eighteen-year-old adult, has reserved the right to protect his private information on his phone, and the school lacked sufficient grounds to invade that privacy in an intrusive manner.

A. THE INITIAL TRANSACTION NOTIFICATION DID NOT PRESENT ENOUGH SUSPICION TO WARRANT A SEARCH FOR A VIOLATION OF THE SCHOOL'S VAPING POLICY BECAUSE THE NOTIFICATION WAS TOO AMBIGUOUS TO SUGGEST WRONGDOING HAD OCCURRED.

First, the Venmo notification—displaying a smoke emoji and the words "thanks for the pod"—did not present the school official, Jane Sylvester, with an adequate reason to justify a further search of the phone. A search by a school official is justified at its inception if the official has "reasonable suspicion" that a search will result in evidence of unlawful behavior or a violation of school policy. *Id*. at 342. Sylvester did not have such a reasonable suspicion here, because the Venmo notification itself evinced no indication of a vape sale in a location on campus, and the school official should have taken other steps first before looking at Keshara's phone.

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A school official has reasonable suspicion that a student has violated school policy on harassment using his cell phone if claims from other students suggest the student has been bullying others via text. *Jackson v. McCurry*, 762 F. App'x 919, 927 (11th Cir. 2019). In *Jackson*, a student had been allegedly sending cruel text messages to another student. *Id*. at 922. When a school official heard about the situation, he interviewed other students who confirmed the rumor. *Id*. The student's teacher ordered the student to hand over her cell phone and reviewed her text messages. *Id*. The phone was returned to the student after the school officials did not see anything problematic, but the student sued over the search. *Id*. at 922-23. The court held the search to be justified at inception because the school official authorized the search based on information he received from another school official and interviews with students indicating conduct that would constitute a violation of school policy. *Id*. at 927.

Similarly, a search is justified at inception if the school official authorizing it has taken steps to confirm a serious policy violation involving a type of drug through conversations with others. *Williams v. Ellington*, 936 F.2d 881, 887 (6th Cir. 1991). The search in *Williams* started when a fellow student reported that the plaintiff had been using drugs. *Id*. at 882. The school official then investigated further: for example, he found out that the plaintiff's behavior was "strange" from another teacher, who found a note from the plaintiff referencing a drug, and he later found out from another student that it looked like the plaintiff had a drug. *Id*. at 882-83. Based on that information, the official searched the student's locker, person, and clothes, and found no drugs. *Id*. at 883. The court held the search to be justified at inception because of the information available at the time. *Id*. at 887. Additionally, the type of item sought (a potential narcotic) justified the intrusiveness of the search because of the severity of narcotics. *Id*.

Keshara's case can be distinguished from these two cases because the school official here lacked the amount and quality of evidence of potential wrongdoing that justified the searches in those cases. Unlike in *Jackson*, when the school official had heard reports from other students of a violation of school policy,

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in this case there was just an ambiguous emoji with an ambiguous message, which could have had a whole host of meanings—many of them fully lawful. (Venmo). In the *Jackson* case, even if the violation was not proven, it was not ambiguous what the violation allegedly was. Here, the word "pod" and the emoji are both ambiguous enough to be open to multiple reasonable interpretations since young people use the same emojis to convey a variety of meanings. Similarly, in *Williams*, the school official took several steps to confirm his suspicions of the use of a drug before conducting a search. By contrast, Sylvester took no additional steps to learn more about Keshara's potential use of the vaping pods before authorizing a search of the phone. (Sylvester Dep. 17:8-10). True, one could point to Sylvester's awareness of the vaping problem on campus—the extent and gravity of which is undisputed. (Sylvester Dep. 12-13:30-4). But in *Jackson* and *Williams*, the information indicated a specific concern about a specific student violating policy, not a generalized concern about students disobeying school rules. Background information about vaping, meanwhile, is not specific to Keshara. Thus, the information available to Sylvester did not amount to a search justified at inception.

Moreover, general background knowledge of a specific student's past misbehavior is insufficient to justify a search at its inception. In *G.C.,* the plaintiff's phone was confiscated and examined while he was sending text messages in class, in violation of school policy. *G.C. v. Owensboro Pub. Sch.,* 711 F. 3d 623, 634 (6th Cir. 2013). The teacher justified her search on the basis that she was aware of previous incidents in which the plaintiff had expressed suicidal thoughts, engaged in drug abuse, or had emotional outbursts. *Id*. at 627, 634. The court rejected that rationale and held "that general background knowledge" of prohibited conduct "without more" does not allow a school official to search the contents of a student's cell phone "when a search would otherwise be unwarranted." *Id*. at 633-34.

Here, any past misdeeds by Keshara did not justify searching his phone. Like the teacher's unwarranted search of the plaintiff's phone based on general background knowledge of the plaintiff's history of concerning behavior in *G.C.,* Sylvester admitted that her search was tied to preconceived

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notions of Keshara's character. Sylvester explicitly stated that she knew Keshara to be "part of the cool crowd," "a bit tough on the nerdy kids," "a hot shot," and even referenced Keshara's age, stating that he was "old for his grade … already 18 at the time." (Sylvester Dep. 9:22-25). These impressions of Keshara motivated Sylvester's actions first in confiscating his cell phone under the cyberbullying policy and after the notification flashed on Keshara's phone. Nothing in this sequence of events would have allowed Sylvester to reasonably extrapolate that prohibited conduct was being done on school property solely based on Keshara's character. Moreover, Keshara is of legal age. The law allows him to vape if he so chooses. Even though Gateway High may have prohibited this activity on school grounds, the district may not trample on his legal rights as an adult outside of the school context. Evidence that he was involved in vaping off-campus is thus immaterial. In sum, the school possessed no legal justification to search the phone at inception because of the ambiguity of the Venmo notification.

B. THE AMOUNT AND TYPE OF INTIMATE INFORMATION ON KESHARA'S CELL PHONE RENDERED THE SCOPE OF THE SEARCH INAPPROPRIATE.

Because a cell phone is known to contain such intimate parts of a person's life, the far-reaching scope of the search of Keshara's phone was inappropriate in light of the weak justification for the search. If a search is justified at inception, then a court evaluates "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" *T.L.O.*, 469 U.S. 325, 341. The search's scope must also account for other characteristics, since it may not be overly invasive given the type of violation and the student's gender and age. *Id*. at 342. As an eighteen-year-old student with a good character, the school's interest in ensuring that a student like Keshara was not selling vape pods on campus did not warrant such a deep search into his phone.

The information on a cell phone legally requires great protection as a privacy right because of its place in the lives of many Americans today. *Riley v. California,* 573 U.S. 373, 403. The right to privacy has been historically valued by Americans as far back as the Founding. *Id.* Thus, it warrants great respect and attention as society evolves. In *Riley*, the Court held that police officers need to get a warrant before

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searching the information on a cell phone because of how private cell phones have become. *Id.* The Court pointed to evidence that ninety percent of Americans use phones as a store of incredibly personal information about their private lives. *Id.* at 395. For instance, the Court noted applications that people use concerning their romantic lives and internet searches regarding their medical situations, all of which should not be intruded upon by the government absent appropriate justification. *Id.* at 395-6. Indeed, the Court stated "a cell phone would typically expose to the government far more than the most exhaustive search of a house." *Id.* at 396.

In the school-search context, then, it is not appropriate for a school official to look through the applications on a student's phone when the search is not directly responsive to a violation of using a cell phone on school grounds and the violation is not considered a serious offense. *J.W. v. Desoto Cnty. Sch. Dist.,* 2010 U.S. Dist. LEXIS 116328, at *12, (N.D. Miss. Nov. 1, 2010). The plaintiff was caught using his phone in school in violation of school policy. *Id.* at *2. In response, a school official seized his phone and viewed his pictures, finding gang pictures that ultimately led to discipline for the plaintiff. *Id.* at *3-4. The court found the extent of the search constitutional because it allowed the school to discern why the student was using the phone improperly, and because the student was knowingly violating school policy by even having the phone at school. *Id.* at *12-15; *see also Klump v. Nazareth Area Sch. Dist.,* 425 F. Supp. 2d 622, 640-41 (E.D. Pa. 2006) (holding that the school official's calling of other students on the seized cell phone was unwarranted although the initial seizure was justified by an illicit use of a cell phone during school).

The extent of the search of Keshara's phone here was not reasonable because of how personal the information on Keshara's phone was. Keshara kept a lot of personal things on his phone that he would prefer to keep private, some of which he would even be embarrassed to share. (Keshara Dep. 16:23-24). For example, he kept notes about his feelings towards his ex-girlfriend and the sale of his off-campus vape pods. (Vape Sales). Like the millions of other Americans referenced in *Riley,* Keshara expected that

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the information he kept on his cell phone would be kept private from government scrutiny, at least absent good reason for a search. Furthermore, unlike the search in *J.W.*, this was not a search based on the illicit use of a cell phone. Here, Keshara admittedly was not supposed to be using his cell phone that morning—though, unlike the district in *J.W.*, the school did not have a blanket prohibition on phones in school. (Sylvester Dep. 9:8-9). But his phone was searched in response to a Venmo notification, not to the use of a phone, making the invasion unjustified.

The scope of an "extensive" and intimate search of a student for drugs is not justified without evidence that the drugs present a danger to the students around them. *Safford Unified Sch. Dist. # 1 v. Redding,* 557 U.S. 364, 376 (2009). There, a school official called a student into her office with evidence that some ibuprofen and naproxen pills—which were against school policy—belonged to her. *Id.* at 368. The school official soon thereafter had the student searched so thoroughly that she was forced to partially expose intimate parts of her body, but school officials ultimately discovered no pills. *Id.* at 369. The school justified the search by claiming the student had a reputation of being "part of an unusually rowdy group at the school's opening dance." *Id.* at 373. The search was held unconstitutional because there was not a proper reason to believe that the pills were dangerous to other students or that they were hidden in her underwear. *Id.* at 368. While the suspicions may have justified a search of her backpack and some outer parts of her clothing, it did not justify a search as intimate as it ultimately became because of "both subjective and reasonable societal expectations of personal privacy." *Id.* at 374. Moreover, the Court reasoned a search that intimate requires its "own specific suspicions." *Id.* at 377.

Additionally, the reasonableness of a search's scope is determined by whether the "nature and immediacy of the governmental concern" is "congruent" with the means used. *Brannum v. Overton County Sch. Bd.,* 516 F.3d 489, 497-8 (6th Cir. 2008). In *Brannum*, a school board decided to install video surveillance in the locker rooms to promote student safety. *Id.* at 492. These videos were accessible through the internet with a proper password. *Id.* School officials ended up seeing these images before

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later removing the cameras. *Id.* at 493. The court held the search to be unconstitutional: because there was not enough evidence of student safety issues, such an invasion of privacy was not warranted. *Id.* at 498.

Sylvester's concern about a potential violation of the school's vaping policy did not justify the extent of her search of Keshara's cell phone. A cell phone is quite intimate. Vaping is indeed a problem. However, vaping legally is different from an illegal drug, which in some cases can immediately have dire consequences. Without knowing the precise ramifications of using the pills in *Redding,* vaping cannot be as immediate of a concern because its physical consequences are not as immediate as something you puff. (Sylvester Dep. 12-13:30-2). (Keshara Dep. 6:5-7). Moreover, in that case, if the student had been caught with pills, it meant they were being used on school grounds, whereas here, Sylvester had no reason to know whether the vape sales were taking place on or off campus. Additionally, there was no concrete evidence that the school's concern about vaping required immediate action; a similar lack of evidence concerning an urgent need for school action doomed the search in *Brannum*. (Sylvester Dep. 12-13:30-2). While the invasion of privacy here did not involve intruding on a student's bodily privacy, the violation of the digital privacy Keshara enjoyed on his phone was unwarranted absent indications of an imminent risk of harm to the student body. Thus, the scope of the search was not justified by the government's concerns, and the search was unconstitutional.

CONCLUSION

Summary judgment must be denied because a reasonable juror could conclude that the privacy concerns in a cell phone at stake in this case rendered the two searches and the school's policy unconstitutional. The first search was unreasonable because allowing school officials to freely examine a student's messages is not justified by the needs of the school to adequately combat cyberbullying. The second search, meanwhile, violated the Fourth Amendment because Sylvester's looking at some of the most intimate parts of Keshara's life was not commensurate with the evidence allegedly causing her to suspect a violation of school policy. Thus, summary judgment cannot be granted as a matter of law.

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Writing Sample

The following writing sample is an excerpt from a paper I wrote for a seminar taught by Prof. Catherine Struve and Judge Anthony Scirica of the United States Court of Appeals for the Third Circuit. In the paper, I respond to Judge Eric Murphy's critique of associational standing written in *Association of American Physicians & Surgeons v. United States Food & Drug Admin*., 13 F. 4th 531 (6th Cir. 2021) ("*AAPS*"). I argue that associational standing can be defended based on an idea I name the aggregate theory—that an injury to a member of an association constitutes an injury to the association itself. For the purposes of this writing sample, I include only the first half of the paper.

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Associational Standing's Roots in Traditional Group Litigation: A Treatment of the *Hunt* Test and a Response to *Association of American Physicians & Surgeons*

I. Introduction

In a recent decision issued by the Sixth Circuit, Judge Eric Murphy made headlines when he called into question the propriety of associational standing doctrine.[1] Associational standing is a doctrinal test that permits an association to sue on behalf of its injured members.[2] Associations use this test to advance causes important to their organizations' missions and for the administrative convenience it provides for its members who could be under-equipped to bring suit on their own. I argue in this paper that associational standing can be defended doctrinally from a historical perspective and from the perspective of *stare decisis* despite some possibly undesirable consequences for the preclusion of an association's members. I contend that under the aggregate theory, the identity of the association and its members are identical, such that the injury to the members can also be legally attributed to the association-plaintiff. Semblances of this theory can be found in instances of group litigation in medieval England and litigation arising from bills of peace, resembling associational standing—providing a helpful historical basis for the doctrine.

In Part II, I provide an overview of *Association of American Physicians & Surgeons (AAPS) v. United States Food and Drug Administration*, the case giving rise to Judge Murphy's critique

[1] *See infra* Parts II and IV; *see, e.g.*, Drew Gann et al., *Associations Stand Down: Sixth Circuit Casts Doubt on Associational Standing,* MCGUIREWOODS (Sept. 22, 2021), https://www.classactioncountermeasures.com/2021/09/articles/class-action/associations-stand-down-sixth-circuit-casts-doubt-on-associational-standing/.
[2] *See* Hunt v. Wash. State Advert. Comm'n, 432 U.S. 333, 343 (1977) (articulating the associational standing test).

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and triggering this response.[3] In Part III, I summarize standing and associational standing doctrine. In Part IV, I detail Judge Murphy's doctrinal critiques of associational standing, further discussing *Hunt* and the associational standing test. In Part V, I question the Judge's interpretation of the role of historical precedent in standing analyses considering recent caselaw. In Part VI, I discuss the aggregate theory, elaborating on the concept that an identical legal relationship between the association and its members exists in this context. I argue most notably that injuries to members of an association can be treated as injuries to the association entity itself. In Part VII, I argue that group litigation in medieval England and litigation arising out of the bill of peace in courts of equity provide historical precedent for associational standing and manifest some applications of the aggregate theory to group litigation. In Part VIII, I summarize the doctrinal argument for associational standing. In Part IX, I analyze the implications of the aggregate theory for the preclusion of the association's members following a suit. In Part X, I briefly mention how some of the *stare decisis* factors may counsel against overturning associational standing, before finally concluding.

II. *Association of American Physicians & Surgeons v. United States Food and Drug Administration*: A Factual Overview

Last year, the Sixth Circuit dismissed a lawsuit brought by the Association of American Physicians & Surgeons (AAPS) because it lacked standing.[4] Analyzing the Association's standing under the associational standing test, the court held that the plaintiff lacked standing because it "failed to plausibly plead that any member has been injured by the actions of the

[3] *See* 13 F.4th 531 (6th Cir. 2021).
[4] *See generally id.*

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[defendant] Food and Drug Administration," violating the first prong of the associational standing test.[5] At the start of the COVID-19 pandemic, the Food and Drug Administration "issued an Emergency Use Authorization ('Authorization')" of the drug, hydroxychloroquine, to treat COVID-19, by allowing it to be given out by the federal government in situations "to treat adult and adolescent patients who weigh 50 kg or more hospitalized with COVID-19 for whom a clinical trial is not available, or participation is not feasible."[6] AAPS contended that the FDA should have allowed for a wider range of availability for its members, because the drug can help patients in some situations before they get COVID-19 or to immediately alleviate COVID-19.[7] AAPS thus sought declaratory and injunctive relief to stop the Authorization's restrictions.[8] AAPS also pled that it had standing because: first, AAPS pled an injury on behalf of physicians member to AAPS, arguing that the Authorization curtailed the physicians from distributing the drug for COVID-19; second, AAPS argued it had third-party standing on behalf of "its members' patients [that] could not obtain the drug for treatment of COVID-19."[9] The court held that none of the alleged injuries adequately pled standing for AAPS.[10] Judge Murphy took advantage of the opportunity to also voice his concerns about the doctrinal foundation of associational standing.[11]

III. Standing Doctrine and the Reasoning of the *Hunt* Court

Courts commonly formulate standing to maintain three components as dictated by the Constitutional limit in Article III on the judiciary to hear cases and controversies: (1) an injury in

[5] *See id.* at 534.
[6] *Id.* at 535.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at 547.
[11] *See id.* at 537–47.

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fact must have been suffered by the plaintiff, (2) the alleged injury must have been caused by the conduct asserted to be unlawful, and (3) there must be a sufficient likelihood that the judiciary can redress the injury.[12] The federal judiciary can add to these requirements of standing through "judicially self-imposed limits on the exercise of federal jurisdiction."[13] The Court recently emphasized the importance of asserting a "concrete harm" with a "close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts—such as physical harm, monetary harm, or various intangible harms including . . . reputational harm."[14] The Court also mentioned the importance of Article III's standing requirements to the protection of our federal government's idea of separation of powers.[15]

The commonly used formulation for associational standing emerged out of *Hunt v. Wash. State Apple Advert. Comm'n*.[16] The Court held that a plaintiff has standing to bring a lawsuit "on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c)[17] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[18]

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[12] United Food and Com. Workers Union Loc. v. Brown Grp., 517 U.S. 544, 551 (1996).
[13] *Id.* (citing Allen v. Wright, 469, U.S. 737, 751 (1984)).
[14] TransUnion L.L.C. v. Ramirez, 141 S. Ct. 2190, 2200 (2021) (citing Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016)).
[15] *Id.* at 2203.
[16] Hunt v. Wash. State Advert. Comm'n, 432 U.S. 333, 343 (1977).
[17] The Court has held the third element of the associational standing test to be "prudential only." *See* Ass'n of American Physicians & Surgeons (AAPS) v. United States Food and Drug Admin., 13 F.4th 531, 542 (6th Cir. 2021) (citing *Brown Grp.*, 517 U.S. at 556–57).
[18] *Hunt*, 432 U.S. at 343.

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In *Hunt*, the Court cited *Warth v. Seldin*, which held that an association can sue on behalf of its injured members if the members are not needed in the actual litigation.[19] The Court added to the analysis by claiming that this type of standing can be invoked so long as one can presume that the relief sought by the association will also be to the relief of the injured members of the association.[20] *Warth* cited three cases in defense of standing for an association[21]: *NAACP v. Alabama ex rel. Patterson*,[22] Justice Jackson's concurring opinion in *Anti-Fascist Comm. v. McGrath*,[23] and *Nat'l Motor Freight Traffic Ass'n v. United States*.[24]

The two majority opinions did not provide a strong historical basis for associational standing. In *Nat'l Motor Freight Traffic Ass'n*, the Court simply stated that the associations were "proper representatives" because they were statutorily recognized to protect the interests of their members in this particular challenge against the Interstate Commerce Commission as associations of motor carriers.[25] In *Alabama ex rel. Patterson*, the association asserted the privacy rights of its members in protecting information in the group's membership lists, writing that "[p]etitioner is the appropriate party to assert [the] rights, because it and its members are in every practical sense identical."[26]

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[19] *Id.* at 342–43 (citing Warth v. Seldin, 422 U.S. 490, 511 (1975)).
[20] *Id.*
[21] *Warth* used these cases to argue that an association could have standing either if it was injured itself while using the rights of its members or by only bringing suit on behalf of injured members. 422 U.S. at 511.
[22] 357 U.S. 449, 458–60 (1958).
[23] 341 U.S. 123, 183–87 (1951).
[24] 372 U.S. 246, 247 (1963).
[25] *Id.*
[26] 357 U.S. at 458–60.

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Justice Jackson, in his concurring opinion in *McGrath*, argued that the association should have the right to sue on behalf of its members.[27] The association sued after it was included on a list of groups that were deemed "subversive" and asserted its constitutional rights.[28] Jackson argued that the association should be permitted standing as a practical matter, because of the shared interests at stake in guarding against a damaged reputation for the association and its members, and because the government viewed a criticism of the organization's mission as equally a criticism of all its members.[29] Thus, he wrote that it makes practical sense for the association to protect its members' rights in litigation.[30]

IV. Judge Murphy's Critique of Associational Standing

Judge Murphy takes issue with the *Hunt* test, noting that recent caselaw on standing ought to especially lead to a re-evaluation of associational standing.[31] The first prong of the test, allowing for an association to invoke a "nonparty injury," allegedly does not fulfill the requirement for a plaintiff to assert a "particularized injury."[32] He argues that courts must be guided by "historical practice" when it determines "whether an injury satisfies Article III's requirements. *See TransUnion*, 141 S. Ct. at 2204," and cites examples of representative litigation, in which the Court allegedly "ensured that historical practice supported [the injury asserted]."[33] He alleges that *Hunt* failed to follow this requirement in merely citing *Warth* (which purportedly "included

[27] *McGrath,* 341 U.S. at 183–87.
[28] *Id.* at 125.
[29] *Id.* at 187.
[30] *Id.* Jackson also manifests shades of the aggregate theory when reasoning that the government presumed the "subversive purpose and intents" to be identical with that of the association. *Id.*
[31] *See* Ass'n of American Physicians & Surgeons (AAPS) v. United States Food and Drug Admin., 13 F.4th 531, 538 (6th Cir. 2021).
[32] *Id.*
[33] *Id.*

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no justification rooted in tradition" in the cases *Warth* itself cited and described in Part III of this paper) rather than "any common-law analogy."[34] Judge Murphy argues that this lack of historical precedent should alarm courts because he believes that the trajectory from cases such as *Flast v. Cohen* to *Lewis v. Casey* have evolved standing from a less meaningful doctrine to an essential safeguard of the country's governmental structure.[35]

He next takes issue with associational standing's ability to fulfill the constitutional requirement for standing: that the plaintiff's "requested relief" "redress the plaintiff's injury."[36] If the injured members of the association are not allegedly parties in the lawsuit and without an injury to the actual associational entity itself, associational standing arguably fails to meet the redressability requirement.[37] The logic is that the association has not suffered an injury and thus the relief cannot redress an injury against the plaintiff itself as required by standing.[38] Additionally, there may be another violation of standing depending on the breadth of injunctive relief granted.[39] If relief would accrue to non-injured members of the association, such as future members or current members who are not asserted to be injured, there may be another redressability issue.[40] Related to the scope of relief, an additional problem may arise concerning whether some or all members of the association should be bound by a negative judgment if they would in fact benefit from a judgment in favor of the plaintiff.[41]

[34] *Id.*
[35] *Id.* at 539.
[36] *Id.*
[37] *Id.* at 540.
[38] *Id.*
[39] *See generally id.* at 540–41.
[40] *Id.*
[41] *Id.*

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Lastly, the Judge asserts that *Lexmark Int'l, Inc. v. Static Control Components, Inc.* calls into question the propriety of applying prudential standing limitations, which may also call into question associational standing.[42] Without examining the first prong of the associational standing test—and before acknowledging the prudential nature of the third prong—the Judge claims that the second prong is arguably prudential because its purpose is to ensure the proper adversarial incentives for the parties to the litigation,[43] an allegedly prudential guideline.[44]

V. Defining the Role of Historical Precedent in Associational Standing

Historical precedent has an important role to play in evaluating the adequacy of an injury in a standing analysis.[45] Nevertheless, I qualify the role of historical tradition in this particular analysis because I contend that the Judge slightly overstates its magnitude. First, I assert that historical precedent is a helpful marker of the adequacy of an injury in fact, but that it is not strictly necessary to find an analog in historical tradition. Second, I assert that the historical analogy, particularly as it is laid out in *TransUnion L.L.C. v. Ramirez*, should be made to the harm itself,[46] as opposed to the representative plaintiff's relationship to the harm, as Judge Murphy suggests.[47]

The Judge contends that when the Court legalizes a form of representative litigation, it has "ensured that historical practice supported [the representative litigation.]"[48] He also accurately asserts that "historical practice should guide courts when deciding whether an injury satisfies

[42] *Id.* at 542.
[43] *Id.*
[44] *Id.* (citing United States v. Windsor, 570 U.S. 740, 759–60 (2013)).
[45] TransUnion L.L.C. v. Ramirez, 141 S. Ct. 2190, 2200 (2021).
[46] *See id.* at 2204; *see also* note 44 supporting this proposition.
[47] *AAPS*, 13 F.4th at 538.
[48] *Id.*

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Article III's requirements. *See TransUnion*, 141 S. Ct. at 2204."[49] When discussing the lack of historical precedent cited, he contends that courts must be sure that historical practice authorizes this form of representative litigation.[50] Labeling historical precedent as a requirement for representative litigation when analyzing whether an injury is adequate to grant a party standing overstates what recent caselaw suggests. In *TransUnion*, the Court said that "history and tradition offer a meaningful guide" when assessing whether a harm is properly concrete.[51] The Court then said that *Spokeo v. Robins* "indicated that courts should assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts."[52] But, notice that *Spokeo* merely states this historical analysis is "*instructive*" because standing is a rule that comes from the Constitution.[53] The first definition of "instruct" is: "to give knowledge to;"[54] the definition of "meaningful" is: "full of meaning, significance,"[55] and the definition of "significant" is: "important deserving of attention; of consequence."[56] The Court accordingly sees historical tradition as an important data point, but the historical data does not rise to the level of "authoritative" or "necessary" for a harm to be adequate at law for a standing analysis. Moreover, *Spokeo* was especially concerned with

[49] *Id.*
[50] *Id.*
[51] *TransUnion*, 141 S. Ct. at 2204 (quoting Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 274 (2008)).
[52] *Id.*
[53] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2008).
[54] *Instruct*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/instruct (last visited Dec. 4, 2022).
[55] *Significance*, DICTIONARY.COM, https://www.dictionary.com/browse/significance (last visited Dec. 4, 2022).
[56] *Significant*, DICTIONARY.COM, https://www.dictionary.com/browse/significant (last visited Dec. 4, 2022).

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examining the propriety of the harm[57] in that case because the case dealt with an intangible harm, namely personal interests in the handling of inaccuracies regarding one's credit information by a digital search engine,[58] which would naturally make the Court more concerned about ensuring the adequacy of the harm for standing.

VI. The Aggregate Theory: Properly Connecting the Legal Relationship between the Association and its Injured Members

To properly understand the propriety of associational standing, one must understand that the concept of associational standing arises out of a relationship between the association and its members that is more entangled than one might think in representative litigation ordinarily. Given the emphasis in recent caselaw on the need for a plaintiff to suffer a particularized injury, Judge Murphy asks: "How then can the Association sue in this case if it has *not* suffered an injury? The Court previously said that the first associational-standing factor (that an entity's members have suffered an injury that would give them standing if they sued) satisfies this element."[59] He then adds "[y]et the Court's recent cases suggest that this nonparty injury alone does not suffice."[60] Needless to say, that contention rests on the premise that the association has not suffered an injury. I challenge this premise. Instead, I contend that the association has in fact suffered an injury if its members have been injured, and although associational standing may be labeled representative litigation, the Court has envisioned such a tight relationship between the

[57] Notice that the historical inquiry is about the *harm itself* being recognized as adequate, and not a historical inquiry into whether a representative plaintiff's *relationship to the harm* was historically adequate to confer standing.
[58] *See Spokeo,* 136 S. Ct. at 1540.
[59] Ass'n of American Physicians & Surgeons (AAPS) v. United States Food and Drug Admin., 13 F.4th 531, 538 (6th Cir. 2021).
[60] *Id.*

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association and its members, which aligns with the understanding of village and parish litigation in medieval England.[61]

Evidence of this understanding can be found in one of the cases cited in *Hunt*, *NAACP v. Alabama ex. Rel. Patterson*, in which the Court must have understood the standing of the association to derive from its members because the "[p]etitioner [was] the appropriate party to assert these rights, because it and its members [were] in every practical sense identical."[62] This is an instance of aggregate theory reasoning.[63] Admittedly, this can be argued to be a legal fiction,[64] but courts have employed legal fictions before so plaintiffs can bring suit.[65] Thus, courts could conceive of injuries to an association's members to also be an injury to the association itself, because the court can employ a legal fiction that the association is indistinct from its members, giving the association standing to sue because it has suffered its own particularized injury. Admittedly, one could point to some language from the Court indicating an understanding of the

[61] *See infra* Part VII.
[62] Donald F. Simone, *Associational Standing and Due Process: The Need for an Adequate Representation Scrutiny*, 61 B.U. L. REV. 174, 178 n.31 (1981) (citing NAACP v. Alabama ex. rel. Patterson, 357 U.S. 449, 459–60 (1958)).
[63] *Id.* ("Courts have attempted to justify associational standing by adopting the view that the plaintiff association is simply an aggregate of its individual members. Under this approach the personal injuries of the members give the association a personal stake in the litigation because the association is the collective embodiment of its members. Thus a case or controversy exists, and article III is satisfied"); *see also id.* at 177–78 (noting that *Sierra Club v. Morton* also displays origins of this theory in reasoning that an association would be properly "aggrieved" if it could only allege injury to its own members in a dictum, which was later applied to justify standing for an association in *United States v. Students Challenging Regulatory Agency Procedures* (*SCRAP*), 412 U.S. 669 (1973)).
[64] To read full counter arguments suggesting that the aggregate theory leads to adequacy of representation issues (some of which are covered in Part IX), see *id.* at 179–81.
[65] *See, e.g.*, *id.* at 178 (mentioning derivative litigation wherein the shareholders are pretended to represent the corporation in litigation).

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association as suffering a separate injury. My point, however, is that the aggregate theory also encompasses a plausible way to interpret some of the Court's jurisprudence in this doctrinal area.

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Date of BA/BS	**May 2021**
JD/LLB From	**University of Southern California Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90513&yr=2009**
Date of JD/LLB	**May 12, 2024**
Class Rank	**10%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Hale Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 12, 2023

The Honorable Michael Brennan
United States Courthouse and Federal Building
517 East Wisconsin Avenue, Room 618
Milwaukee, WI 53202

Dear Judge Brennan:

Of the many applications you receive, this is likely the only one to link an applicant's motivation to ice cream. I am a rising third-year law student at the University of Southern California Gould School of Law, and I am excited to submit my application for a clerkship in your chambers from 2024–2025. Before this, however, I grew up working in my family's ice cream shop in a small town in Massachusetts. There, I developed an unshakeable commitment to serving the community, a strong small-business work ethic, and the affability that comes from a small-town store. In law school, I honed these qualities into a passion for collaborative problem solving, and that passion is one of the many reasons why I am applying to clerk for you.

After law school, I have accepted a position in the U.S. Navy JAG Corps. The Navy allows me to defer my service for a clerkship, but the Navy provides no benefit for having clerked. Thus, my motivations for clerking are limited to those benefits that inhere in the clerkship itself. Service, whether in the military or for the judiciary, provides a unique opportunity to devote oneself to causes and projects that truly have an impact on people's lives. I recognize the responsibility that comes with this opportunity, and the same commitment to public service that motivated my applications to the Navy also motivates my application and your chambers.

My other principal reason for clerking is my passion for diving into new research problems and writing opportunities. I have taken extra writing courses, including Judicial Opinion Writing, because each opportunity provides a new chance to confront a problem in an unfamiliar area of law. Unfortunately, USC only allows me to participate in either moot court or law review, but I would have pursued the research opportunities in both honors programs if that was allowed. In moot court, I approached the research with so much enthusiasm that my peers voted to award me a service award, and I was selected to run the program next year. I truly care about making sure the work I do is both done well and ultimately useful to others. This enduring aspect of my character will allow me to bring value as a clerk in your chambers.

I want to clerk at the appellate level because that experience would allow me to confront myriad issues of law and continue to feed my passion for legal research and writing. I adored the opportunities I have had to engage with appellate advocacy, and I would love to engage with the law as a clerk in an appellate court. I have no qualms with working long hours on projects I find interesting or important, and I believe clerking provides the opportunity to work on those projects. Above all, however, I want to work alongside passionate people who are also committed to being a part of something bigger than themselves. I would be honored to clerk in your chambers.

Sincerely,

Graham Smith
USC Gould School of Law

Graham Smith

818 S Grand Ave, Apt. 502, Los Angeles CA 90017 | 508-364-3638 | graham.smith.2024@lawmail.usc.edu

EDUCATION

UNIVERSITY OF SOUTHERN CALIFORNIA GOULD SCHOOL OF LAW

Juris Doctor Candidate, May 2024

GPA: 3.87 (Top 10% after 1L year = 3.76; current Class Rank forthcoming)

Honors: Hale Moot Court Honors Program

- Participant: Quarterfinalist, Outstanding Service Award Winner, Outstanding Oral Advocate Winner
- Chair: 2023–2024

Highest Grade: Constitutional Law; Modern US Supreme Court

Leadership: Student Bar Association, Academic Affairs Chair; Public Interest Law Foundation, Public Donations Co-Chair; First Generation Professionals, Academic Affairs Chair

Pro Bono: International Refugee Assistance Program, Shining Light Volunteer; National Lawyers Guild, Homeless Citation Clinic Volunteer

COLLEGE OF THE HOLY CROSS

Bachelor of Arts with Honors, History, Political Science**,** *summa cum laude***,** May 2021

GPA: 3.87

Honors: Dean's List; Honors Program; Phi Alpha Theta

Honors Thesis: "*The Failure of the Corwin Amendment and Article V*"

Activities: Ultimate Frisbee, Captain; Moot Court, Captain

EXPERIENCE

US Attorney's Office for the Central District of California — Los Angeles, CA
Extern, Criminal Division — (Commencing Fall 2023)

Sullivan & Cromwell LLP — Los Angeles, CA
Summer Associate — May 2023 – Present

- Drafted legal writing on a variety of complex issues on accelerated timeline
- Researched issues including state secrets doctrine and corporate control of electronically stored information

USC International Human Rights Clinic — Los Angeles, CA
Law Student Clinician — August 2022 – May 2023

- Advocated for a neglected humanitarian crisis before the ICC's Office of the Prosecutor
- Led a team that authored report identifying crimes against humanity in Cameroon

USC Gould School of Law — Los Angeles, CA
Research Assistant and Teaching Assistant for Professor Ariela Gross — Summer 2022 – May 2023

US Navy JAG Corps — Washington, DC
Summer Intern, Code 46 Appellate Government — Summer 2022

- Drafted briefs on behalf of the United States to be submitted to Armed Forces Courts of Criminal Appeals
- Prepared attorneys for oral arguments through moot courts
- Researched issues in ongoing litigation such as government searches of cellphone location data

Smitty's Homemade Ice Cream — Barnstable, MA
Manager, Scooper — June 2013 – 2022

COMMUNITY INVOLVEMENT

Cape and Islands Veterans Outreach Center, *Volunteer and Organizer***,** Hyannis MA — May 2021

Boy Scouts of America, Troop 77, *Eagle Scout*, Brewster MA — July 2017

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Frank Chang
Registrar

---------- Current Program of Study ----------

02/15/2021 Juris Doctor — Law

---------- USC Cumulative Totals ----------

Law Units Attempted: 65.0 Earned: 65.0 Available: 65.0 GPA Units: 58.0 Grade Points: 224.50 GPA: 3.87

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Fall Semester 2021 (08-23-2021 to 12-15-2021)

LAW-530	CR	1.0	Fundamental Business Principles
LAW-515	3.6	3.0	Legal Research, Writing, and Advocacy I
LAW-503	4.2	4.0	Contracts
LAW-509	3.9	4.0	Torts I
LAW-502	3.5	4.0	Procedure I

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
16.0	16.0	15.0	57.20	3.81

Spring Semester 2022 (01-10-2022 to 05-13-2022)

LAW-531	3.6	3.0	Ethical Issues for Nonprofit, Government and Criminal Lawyer
LAW-516	3.7	2.0	Legal Research, Writing, and Advocacy II
LAW-504	3.8	3.0	Criminal Law
LAW-508	4.2	3.0	Constitutional Law: Structure
LAW-507	3.8	4.0	Property

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
15.0	15.0	15.0	57.40	3.82

Fall Semester 2022 (08-22-2022 to 12-14-2022)

LAW-873	3.9	3.0	Judicial Opinion Writing
LAW-603	4.0	4.0	Business Organizations
LAW-532	3.8	3.0	Constitutional Law: Rights
LAW-849	CR	5.0	International Human Rights Clinic I
LAW-667	3.5	2.0	Hale Moot Court Brief

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
17.0	17.0	12.0	46.10	3.84

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